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TO AMEND THE SHERMAN AND CLAYTON ACTS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH FIRST CONGRESS

FIRST SESSION

ON

S. 994, S. 995, and S. 996

BILLS TO AMEND THE SHERMAN AND CLAYTON ACTS

JULY 25, 1989

Serial No. J-101-31

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
22-883 WASHINGTON : 1989

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-5

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TO AMEND THE SHERMAN AND CLAYTON ACTS—S. 994, S. 995, AND S. 996

TUESDAY, JULY 25, 1989

U.S. Senate,
Committee on the Judiciary,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m., in room SD-562, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (acting chairman of the committee), presiding.

Also present: Senator Thurmond.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator **Metzenbaum**. The hearing will come to order.

Next year, we will celebrate the 100th anniversary of the Sherman Act. We will commemorate the enduring strength and wisdom of the fundamental principles of our economic system that are embodied in the Sherman Act.

After 100 years, the Nation remains committed to the idea that competition is essential to free enterprise. The Sherman Act contains the basic principle of antitrust: no single company or group of companies in concert can act to eliminate competition.

In 1914, Congress passed the Clayton Act to proscribe mergers that lead to a market structure that might encourage this type of conduct. These two statutes form the foundation of our free market system.

The Chair wishes to say that I do not think you could have a sadder day on which to hold this meeting than today, after the failure of the Antitrust Department of our own Government, headed up by Mr. Rill's predecessor, had turned its back on the Time-Warner merger and then the matter proceeded to court and the Delaware courts totally failed to take into consideration the concerns of the shareholders or the consumers of this country.

The Delaware courts seem to have a habit of doing that and to them whatever the corporation proposes, that is acceptable with little regard for the rights of the shareholders.

And to read in the paper that the merger that was permitted to go through yesterday, the new conglomerate boasts the Nation's largest cable television company, the leading cable television programming service, the second largest hardback book publisher, a leading paperback publisher, the biggest American-owned music business, the premier magazine group, the top movie studio, and a host of other subsidiaries. "This is a behemoth of a company with just about everything under one roof," said an investment banker.

And then as a part of that merger, to provide for the unbelievable payoffs of corporate executives, $677 million given to them in stock and stock options and bonus payments. Whose money was it? It was the shareholders' money. It did not belong to corporate executives who negotiated the deals and the Chair feels greatly saddened to have seen this, another instance of a corporate merger taking place with little regard to the public, to the consumers, to the shareholders of the companies.

The purpose of the three bills I have introduced, S. 994, S. 995 and S. 996, is to strengthen the procedures for enforcing the Sherman and Clayton Acts and to reform other aspects of the statutes.

The motivation for this legislation is simple. The time has come to strengthen the antitrust laws. We must put more teeth in the laws and put more resources in the hands of the enforcement agencies.

The antitrust enforcement agencies are not equipped to enter the second century of antitrust enforcement. Over the past 10 years, the antitrust staff at the Department of Justice and the Federal Trade Commission has been reduced by 60 percent. During that same period, merger filings increased 300 percent. These figures are shocking.

We cannot afford to sit idly by while our economy comes more and more concentrated and while certain companies and individuals continue to flout the laws of free competition.

Consumers deserve to know that we are committed to the enforcement of the antitrust laws. This legislation reaffirms that commitment.

I am frank to say that I appreciate the cooperation of the ranking member of this committee, Senator Thurmond, who has provided extremely useful and thoughtful suggestions in developing this legislation. He and I joined together in proposing and sponsoring through to enactment the Antitrust Procedure Improvements Act several years ago, as well as a number of other pieces of legislation in this area.

I believe we are of one mind when discussing the importance of the antitrust laws to our free enterprise system.

I am very happy that the ranking member is with us and I know he will not be able to stay for the entire hearing, but I assume he has an opening statement.

Senator THURMOND. Mr. Chairman, I am due at the White House at 10 o'clock. If you do not mind, I will just ask unanimous consent to put my statement in the record.

Senator METZENBAUM. Without objection, so ordered.

[The statement of Senator Thurmond follows:]

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE JUDICIARY COMMITTEE, REFERENCE S. 994, 995 AND 996, 562 DIRKSEN SENATE OFFICE BUILDING. TUESDAY, JULY 25, 1989, 9:30 A.M.

MR. CHAIRMAN:

I am pleased that we are again considering several pieces of legislation that have strong bi-partisan support in the Judiciary Committee and in the full Senate. I am also pleased that you and I, despite our occasional differences on antitrust matters, are co-sponsoring S. 994 , a bill to amend Section 8 of the Clayton Act concerning interlocking directors, and S. 995, the Antitrust Procedures Improvement Act of 1989.

S. 994 should be familiar to everyone here. It is identical to S. 1068, a bill which we reported out of Committee in the last Congress, and which the Senate passed by unanimous consent. I understand that our witness today is from the Association of American Railroads, and will testify before the Committee about Section 10 of the Clayton Act, which covers interlocking directorates among common carriers. Although I am not inclined to include changes to Section 10 in this bill, I am very interested in hearing his views.

I am also interested, Mr. Chairman, in passing this legislation as soon as possible. I am not aware of any disagreement among members of this Committee about the need for amending Section 8, or about the way this legislation is written. Mr. Chairman, in view of the bi-partisan support this bill has, including your own, I hope I can get your help in having S. 994 placed on the Committee's agenda and voted out of Committee in the very near future.

We will also hear testimony from several witnesses about S. 995, the Antitrust Procedures Improvement Act of 1989. In this connection, I am particularly interested in hearing about the proposed increase in criminal fines and about the proposal for a filing fee in connection with Hart-Scott-Rodino pre-merger notification. Although I support this legislation, I am open to comments or proposals about the need for clarification or modification of any of its provisions.

Mr. Chairman, I want to thank the witnesses for taking the time to be with us today and expressing their thoughts on the various pieces of legislation that we are considering.

Senator THURMOND. And I will be back as soon as I can.

Senator METZENBAUM. Thank you very much and thank you for your cooperation.

Our first witness today is James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice, and I believe—is this your first appearance before our committee since being sworn in?

Mr. RILL. In my present capacity, yes, Mr. Chairman.

Senator METZENBAUM. In your present capacity.

Very happy to have you with us this morning.

And Terry Calvani, Commissioner of the Federal Trade Commission, we are very happy to have you with us, Mr. Calvani.

Mr. CALVANI. Thank you, Mr. Chairman.

Senator METZENBAUM. Mr. Rill.

STATEMENT OF MR. JAMES F. RILL, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE; AND TERRY CALVANI, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. RILL. Thank you very much, Mr. Chairman.

I am pleased to have the opportunity to appear before the committee today to present the views of the Department of Justice on S. 994, S. 995 and S. 996.

I have a rather lengthy prepared statement that I would request be inserted in the record.

Senator METZENBAUM. The entire statement will be included in the record.

Mr. RILL. And I will try and summarize this briefly as I can, our testimony.

First, addressing the provisions of S. 995, that would raise the maximum Sherman Act criminal fines to $10 million for corporations and $250,000 for individual offenders; proposals to increase the maximum fines that may be imposed for criminal antitrust violations are of great significance to the Department of Justice.

Our number one antitrust enforcement priority is to route out clearly anti-competitive antitrust violations through criminal prosecution.

Notwithstanding the Department's emphasis on criminal enforcement over the last decade or so, criminal antitrust violations continue to be a major problem.

The Antitrust Division currently has over 150 ongoing grand jury investigations involving a wide range of industries and unlawful practices. Over 40 of these investigations are concerned with bid rigging and price fixing in connection with Federal procurement.

The pervasiveness and persistence of criminal antitrust violations throughout the U.S. economy is strong evidence to me that antitrust penalties, at least historically, have either been set too low or have not been properly meted out.

Although the Sherman Act penalties themselves have not changed during the last 15 years, the maximum fines for individuals convicted of antitrust violations effectively had been increased by other generally applicable legislation from $100,000 to $250,000.

The $1 million maximum in the Sherman Act is, however, still the effective maximum dollar fine for corporate antitrust offenders. New laws do provide an alternative maximum fine for both individual and corporate antitrust offenders of twice the gross pecuniary loss or gain arising from the offense, unless the imposition of the fine would unduly complicate it or prolong the sentencing process.

Unfortunately, the type of analysis inherent in attempting to define the profit or loss from a particular price fixing or bid rigging conspiracy, while we will use it where we can, in many instances would prolong significantly the sentencing process and involve complex factual analysis.

Therefore, we endorse the need for and support the need for an increase in the maximum dollar fine.

A second important development in this regard is the promulgation by the U.S. Sentencing Commission of guidelines that the courts are required to follow in sentencing antitrust offenders for causes of action arising after November 1, 1987.

With respect to fines, the Commission directed that organizational offenders pay fines of between 20 and 50 percent of the volume of commerce affected by the violation.

Parenthetically, this conclusion was reached by the Sentencing Commission in an awareness of the profitability and the difficulty in detecting antitrust violations. The Sentencing Commission observed that one might infer that a price fixing overcharge might amount to as much as 10 percent of the total volume of commerce involved in the affected industry.

However, the substantial sentencing guideline fines for antitrust offenses are capped by the statutory maximum. In other words, if the full guidelines would exceed the statutory maximum, the statute trumps the guidelines.

For these reasons, the Department of Justice supports an increase in the maximum organizational fine for antitrust violations to $10 million.

This would reflect the general increasing concern with white collar crime that has resulted in very substantial increases in penalties for other such crimes in recent years.

It would also take into account the fact that the $1 million maximum fine for Sherman Act violations has not been increased in 15 years and it would increase the ability of the courts to apply the sentencing guidelines within the range up to the pecuniary maximum of $10 million, or in those instances where we can apply it, the 1987 statutes plus the gain or loss cap.

This is a very important piece of legislation to the Department. The Department announced its support for this legislation yesterday. We also have no objection to the increase in criminal fines under the Sherman Act for individuals up to $250,000. We would only point out that the Sentencing Reform Act of 1984 permits the same fine level to be imposed.

Senator METZENBAUM. Do you think that both of those caps are high enough, the $10 million and the $250,000? Do you think they should be higher?

Mr. RILL. I think, based on the analysis that we have been able to make so far, the $10 million probably is an adequate cap. We look at the input from the sentencing guidelines, the fact that it is a ten-fold increase from $1 million, the Canadian precedent establishes a $10 million cap, which is a source from which we can derive some information. No economic analysis of optimal fine levels I think can be drawn out to support any specific number.

Senator **Metzenbaum**. Do you think the $250,000 is adequate?

Mr. **Rill**. Yes, I do, Mr. Chairman.

Senator **Metzenbaum**. Would the corporation be permitted to pay that for the corporate executives?

Mr. **Rill**. I do not know the answer to that, Mr. Chairman. I can supply that. The issue with respect to individual offenders is that there may be a real difficulty in ability to pay at or above a $250,000 level. Our primary deterrent for individuals is jail time and the Department has historically had, and will continue to press very vigorously, for jail sentences for those who commit price fixing and bid rigging offenses.

Senator **Metzenbaum**. What is the maximum imprisonment time?

Mr. **Rill**. The maximum imprisonment time under the Sherman Act is 3 years. The sentencing guidelines would apply somewhat lesser periods of time based on a complicated, but workable set of factors.

I do not think, based on the analysis I have been able to make so far, that the sentencing guidelines significantly undercut the Sherman Act maximum. We seldom get the Sherman Act maximum and I think the sentencing guidelines are salutary in that they will impel the courts to grant actual jail times, whereas too frequently in the past, white collar criminals who violate the antitrust laws have not served jail time, but have been engaged in public service type activities or been required to engage in public service and other less rigorous sanctions.

Senator **Metzenbaum**. You could not have stated it better, Mr. Rill.

Mr. **Rill**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. White collar criminals in this country wind up doing public service activities not only in antitrust matters, but in other areas of corporate criminality as well. It is an absolute embarrassment.

Mr. **Rill**. Well, we are going to do our dead level best to see to it that hard core antitrust criminals serve jail time.

I would like to turn to S. 996, your bill, which would authorize the Federal Government to obtain triple damages for antitrust injuries that are suffered in its capacity as a purchaser.

As you know, the Federal Government currently is limited to single damages in its proprietary capacity. As you also know, we are increasingly focusing on price fixing and bid rigging in Federal procurement cases and we are finding that there is a prevalence of that activity.

We believe it is entirely appropriate to put the United States on a par with other parties who suffer injury from price fixing and bid rigging and we support enactment of S. 996.

I would like to turn to interlocks. The Department supports the objectives of S. 994. It endorses the proposals to correct the major problem in Section 8, the apparent prohibition of interlocks between firms that may technically be viewed as competitors, but that actually compete only to a de minimis extent.

Strict, but we believe reasonable interpretations faithful to the statute do not recognize a de minimis exception from Section 8 at the present time and, therefore, absolutely prevent an individual from serving as a director of two corporations which may be engaged in essentially different businesses when the corporations may sell minimal amounts of competing products.

We have been informed by the Department of Commerce, by other sources that there is an impairment of corporations being readily able to find capable and willing directors that is caused by Section 8's de minimis competitive overlap provisions.

We, therefore, believe that Section 8 would be improved along the lines suggested by S. 994 by a de minimis competitive overlap exception to the broad prohibitions in the current statute.

Let me briefly describe the Department's position concerning the Hart-Scott-Rodino Act amendments contained in S. 995. We believe that the partnership loophole provision is not necessary at this time. We understand that there are legitimate concerns with the partnership loophole provision, even following the amendment that was promulgated by the FTC to include the 50 percent partner's value in the assessment of the size of entity test, but we believe the legislation may create some problems through perhaps over filing by the general partners.

When Congress enacted the Hart-Scott-Rodino Act, it set out the broad outlines of a premerger notification program and indicated that the details would be left to the Federal Trade Commission, with the concurrence of the Department of Justice.

The FTC has a rule making dealing with the partnership loophole in which it proposes five alternative ways in which the particular problem, to the extent it is a problem, might be solved.

We believe that the treatment of acquisitions undertaken by partnerships is the type of matter that can be undertaken by antitrust enforcement and by rule making.

We now understand that the FTC may be willing to accept the proposed legislation and seeks to work with the committee staff to achieve some flexibility.

This is a new development to us, something I have known about less than 24 hours. The FTC is obviously an important player in this field and we will certainly study and respond to their initiative that I expect Commissioner Calvani will be testifying about today.

S. 995 would raise two of the size thresholds in the Hart-Scott-Rodino act to determine whether premerger notification of a particular acquisition is required.

The Department supports the size threshold increases that are proposed in S. 995. S. 995 would make two types of changes in the Hart-Scott-Rodino waiting period. The bill would lengthen the waiting period for transactions that are structured as cash tender offers and it would also authorize the courts to extend the waiting period for any type of acquisition up to 25 days if because of the complexity and scope of the acquisition either the Department of Justice or the FTC reasonably requires such time to determine whether the acquisition might violate the antitrust laws.

The waiting period provisions of S. 995 are modest. We think they are targeted to providing the agencies with the additional time they may require to investigate unusually complex transactions. As a result, the Department has no objection to the waiting period provisions of S. 995.

Senator **Metzenbaum**. Although you say you have no objection, do you support the change?

Mr. **Rill**. We have no objection to it. I think it is fair to say that the change is an appropriate one to be made.

Senator **Metzenbaum**. Thank you.

Mr. **Rill**. S. 995 would raise the maximum civil penalty for Hart-Scott-Rodino violations up to $100,000 a day from the current $10,000 a day level.

Our enforcement experience indicates that the $10,000 a day civil penalty currently authorized may not adequately deter Hart-Scott-Rodino violations. If the failure to file on an HSR violation lasted 100 days, for an example, the maximum civil penalty would be $1 million. Far more than that could be realized by the offenders from secret purchase of the stock.

Increasing the maximum civil penalty would provide additional deterrence in such situations. The $100,000 a day proposal in S. 995 seems to us to be a reasonable one.

S. 995 would also amend Section 7A(g)(1) of the Act. It provides civil penalties in addition to the criminal penalties such equitable relief as the court finds appropriate.

We are not altogether sure what is encompassed in that section. If the authorization of equitable relief in 7A(g)(1) is intended to provide for disgorgement of profits, it should be authorized explicitly and the Department at this time does not have a position on that legislation.

S. 995 would amend the Hart-Scott-Rodino Act so as to allow civil penalties to be recovered in suits brought by the United States or the Federal Trade Commission.

Presently, civil penalties for HSR violations may be recovered only in actions brought by the United States.

Under the Federal Trade Commission Act, the FTC may bring some civil penalty actions itself, where the Department has been notified and does not commence an action within 45 days.

Similar conditional Commission litigating authority may be an appropriate way of accommodating all the relevant concerns with prompt effective HSR enforcement.

We would urge conditioning such authority, however, on the Department's not notifying the Commission within the 45-day period that it has an objection to the Commission's bringing the action at all because of the Department's responsibility to assure and enhance a coordinated Hart-Scott-Rodino enforcement program.

With that limitation, we endorse the provisions of S. 995 dealing with the access of FTC attorneys to court.

With respect to filing fees, S. 995 would require the acquiring person in a transaction that must be reported under the Hart-Scott-Rodino Act to pay a filing fee of one-fiftieth of 1 percent of the value of the transaction.

The FTC would establish by rule the filing fee for transactions in which the precise value is not known and in no event would the filing fee exceed $50,000.

If Congress decides that it is appropriate for the cost of the Government prior review of mergers and acquisitions to be borne by firms that engage in such transactions, we have two reservations with respect to the filing fee provisions.

Our first concern is with legislation fixing the rates schedule. We believe that rates schedules are usually best set by the rule making process, which can give it the flexibility that it needs to take a periodic account of events as they unfold.

Our second concern is related to the reliance on these fees for antitrust enforcement. The receipts naturally would be unpredictable. We think it would be very unwise to supplant appropriations with fees to finance program activities.

We, therefore, urge that if this Section is to be enacted, that there be a clarification as set forth in our prepared statement. We have statutory draft language there that would attempt to assure that the filing fees do not take the place of otherwise appropriated funds for antitrust enforcement.

Mr. Chairman, I appreciate your bearing with me while we cover this variety of subjects, and I very much appreciate the opportunity to be present to present the Department's viewpoint on the legislation.

[The statement of Mr. Rill follows:]

Department of Justice

STATEMENT OF

JAMES F. RILL
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 994 - LEGISLATION TO IMPROVE THE ANTITRUST LAWS
AS THEY APPLY TO INTERLOCKING DIRECTORATES

S. 995 - LEGISLATION TO INCREASE
CRIMINAL ANTITRUST MAXIMUM FINES AND
AMEND THE
HART-SCOTT-RODINO ACT

AND

S. 996 - LEGISLATION TO PROVIDE TREBLE DAMAGES
TO THE UNITED STATES FOR ANTITRUST INJURY

JULY 25, 1989

Mr. Chairman and Members of the Committee:

I am pleased to have the opportunity to appear before the Committee today to present the views of the Department of Justice on S. 994, a bill to amend the Clayton Act regarding interlocking directorates and officers, S. 995, the "Antitrust Procedure Improvement Act of 1989," and S. 996, the "Government Remedies Improvement Act of 1989." These bills cover several areas of antitrust law and procedure in which the Department is vitally interested. I hope our views will assist the Committee in its deliberations on this important legislation.

INTERLOCKING DIRECTORATES

Let me first turn to S. 994 and other proposals to improve section 8 of the Clayton Act, which generally proscribes interlocking directorates among competing firms. Enacted in 1914, section 8 prohibits a director of any firm that has capital, surplus, and undivided profits of more than $1 million from also serving as a director of any other firm if the firms are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws." Because section 8 is a purely prophylactic statute, its prohibition applies without any showing that a director interlock either has had or is likely to have adverse effects on competition. In substance, an individual may not sit on the boards of competing corporations if either firm exceeds the $1 million size threshold.

Section 8's prohibition is relatively clear and unambiguous. However, because of changes in the corporate environment and the decline in the value of the dollar since the statute's passage early in the century, this very broad prophylactic provision has come to prohibit conduct that in fact does not threaten the harm that the statute was originally designed to prevent. Current proposals to improve the statute, including S. 994, are designed to correct this anomaly and return the coverage of section 8 to its original purpose of protecting and promoting competition rather than hindering it.

De Minimis Competitive Overlaps

The Department endorses legislation to correct the major problem in section 8--the apparent prohibition of interlocks between firms that technically may be viewed as competitors, but that actually compete only to a *de minimis* extent. Strict interpretations of section 8 that do not recognize any *de minimis* exceptions to its prohibitions--and these are not unreasonable interpretations given section 8's current language--prevent an individual from serving as a director of two corporations engaged principally in different businesses whenever such corporations also happen to sell even minimal amounts of competing products.

Although director interlocks between substantial competitors raise competitive concerns, the current broad and absolute prohibition of interlocks between corporations that are only incidental competitors makes little sense in the competitive environment of the 1990s. Firms large enough to be covered by the current language of section 8 are often widely diversified, producing or selling a wide variety of products and services, including many that are generally unrelated to their primary lines. De minimis overlaps involving sales that are miniscule in absolute dollar amount, or as compared to the firms' overall business, do not present a plausible competitive threat that would warrant such a prohibition. Moreover, the Department has been informed repeatedly that capable and willing director candidates all too often are being disqualified after counsel's discovery of a de minimis competitive overlap that would subject the proposed directorship to the prohibition of section 8. The problem may be particularly acute with regard to finding qualified outside directors, as likely candidates may sit on several other boards. In short, section 8's prohibition of interlocks involving only de minimis competitive overlaps serves no public purpose, and in fact may be harmful, causing unnecessary frustration and hardship to the business community.

Over the last several years, Congress has considered a number of specific proposals to except director interlocks from section 8 where the competitive overlaps between the interlocked firms are de minimis. S. 2163, introduced in the 99th Congress, would have created three "safe harbors" for de minimis overlaps. The first generally would have permitted interlocks among firms each of whose sales of any competing product were less than 5 percent of its total sales. The rationale of such an exception was the common-sense proposition that boards of directors focus their deliberations on businesses that generate substantial portions of their firms' revenues. The second safe harbor would have permitted interlocks where the total competitive overlap amounted to less than $1,000,000 of each firm's business. The rationale here was that interlocks involving such small amounts of commerce simply do not warrant a broad federal prophylactic prohibition. The third safe harbor in S. 2163 would have permitted interlocks among firms each of whose sales of any competing product were less than 3 percent of the relevant market. The rationale behind this third safe harbor was that harm caused by a director interlock between firms with such small market shares is inherently implausible, because buyers simply would turn to other sellers if the interlocked firms raised prices in concert.

A generally similar approach to the *de minimis* overlap problem was enacted by the Senate during the 100th Congress as part of S. 1068. Although somewhat different from S. 2163, this bill also would have created three *de minimis* overlap exceptions. The first would have applied where the aggregate competitive sales of either interlocked corporation were less than $1 million. The second would have permitted a director interlock where the aggregate competitive sales of either firm were less than one percent of that firm's total sales. The third *de minimis* safe harbor in S. 1068 would have covered situations in which the aggregate competitive sales of *each* of the interlocked firms were less than 4 percent of that firm's total sales. The interlock provisions of S. 1068 as passed by the Senate have been reintroduced this Congress as S. 994.

Another proposal for *de minimis* competitive overlap exceptions in section 8 was introduced last year as H.R. 3954 and has been reintroduced this year as H.R. 29. Similar in many respects to S. 994, this proposal would also establish a *de minimis* exception where the competitive sales of either corporation are less than $1 million, as well as exceptions based on competitive sales as percentages of either or both interlocked corporations' total sales. However, it adopts 3 percent and 5 percent, respectively, as the cut-offs for permissible interlocks based on competitive sales, as opposed to the comparable 1 percent and 4 percent figures in the Senate bill. It is important to note, however, that H.R. 29 also would amend section 8 so as to prohibit interlocks *only* where a merger of the involved corporations "would substantially lessen competition or tend to create a monopoly," i.e., violate section 7 of the Clayton Act. This limitation on the reach of section 8 would narrow its coverage far more than would merely allowing interlocks in *de minimis* overlap situations.

The Department continues to believe that section 8 would be much improved by *de minimis* competitive overlap exceptions to its broad prohibition on interlocking directorates among competitors. Explicit, numerical safe harbors would maintain the commendable clarity of the existing statute, yet would enable the business community to more easily place qualified individuals on their boards of directors. Such improvements to section 8 would enable corporations and director candidates to know in advance whether an interlock would be illegal, while at the same time fully permitting section 8 to serve its competition-safeguarding purpose.

Other Section 8 Improvements

The Department endorses other proposed improvements to section 8. Both S. 994 and H.R. 29 would update the section's jurisdictional size-of-firm threshold. In 1914, Congress limited the coverage of section 8 to interlocks between two or more corporations any one of which had capital, surplus, and undivided profits of more than $1,000,000. One million dollars today is not what it was 75 years ago; thus, section 8 has become considerably more restrictive than it was ever intended to be. The bills that have been introduced would raise the jurisdictional threshold to $10,000,000, and prevent that figure from becoming outdated again by indexing it to the Gross National Product. They also would free small businesses from federal oversight of the make-up of their boards by requiring both interlocked firms to exceed the jurisdictional threshold, rather than just one, as is currently required by section 8. These provisions too would substantially improve section 8, and the Department supports their enactment.

INCREASING MAXIMUM SHERMAN ACT FINES

Let me turn now to S. 995, and first to the provision in that bill that would raise maximum Sherman Act criminal fines from their current levels of $1 million for corporate defendants and $100,000 for individuals to $10 million for corporate and $250,000 for individual offenders. Proposals to increase the maximum fines that may be imposed for criminal antitrust violations are of great significance to the Department. Our number-one antitrust enforcement priority is to root out clearly anticompetitive antitrust violations through criminal prosecution. Examples of conduct that the Department prosecutes criminally are government procurement fraud, bid rigging, price fixing, and market allocation among competitors. These practices have no economic justification and serve only to raise prices paid by consumers. They are illegal per se--a fact well known in the business community. Certain jail sentences coupled with stiff criminal fines are the only appropriate way to deal with and deter this type of white-collar crime.

Notwithstanding the Department's emphasis on criminal enforcement over the last decade or so, criminal antitrust violations continue to be a major problem. The Antitrust Division currently has over 150 ongoing grand jury investigations involving a wide range of industries and unlawful practices. Over 40 of these investigations are concerned with bid rigging and price fixing in connection with federal procurement. Our highest priority in this area has been the investigation and prosecution of bid rigging and price fixing on contracts let by the Department of Defense, including the Army Corps of Engineers. These cases involve procurement of military uniforms, gloves, dredging, moving and storage services for military personnel, and various medical products.

In addition to federal procurement, the Department's criminal enforcement program covers a wide range of other industries. For example, we have continued to prosecute bid rigging in the highway, airport, utility and electrical construction industries. During fiscal 1988, the Department initiated 10 criminal prosecutions involving the electrical construction industry, and has continuing investigations in that industry in nine states. Other industries in which the Department has been particularly active in recent years include school milk, soft drinks, motion picture exhibition, waste disposal and public auctions.

The pervasiveness and persistence of criminal antitrust violations throughout the U.S. economy is strong evidence that antitrust penalties, at least historically, have either been set too low or have not been properly meted out. Congress last specifically addressed antitrust criminal penalties in 1974, when it passed the Antitrust Procedures and Penalties Act, making antitrust violations felonies subject to a $1 million maximum fine for corporations and for individual offenders a maximum of three years in prison and a $100,000 fine. Even assuming that antitrust fine levels were correctly set in 1974, 15 years of inflation has substantially eroded the punitive impact of these maximums. Moreover, in the Department's view, courts all too often have refused to impose significant jail terms on individual antitrust offenders.

Although the Sherman Act penalties themselves have not changed during the last 15 years, the maximum fines for individuals convicted of antitrust violations effectively have been increased by other generally applicable legislation. The Criminal Fine Enforcement Act of 1984 and the Sentencing Reform Act of 1984, as amended by the Criminal Fines Improvements Act of 1987, raised fines for federal crimes across the board. With respect to antitrust violations, these laws effectively have raised maximum antitrust fines for individual offenders from $100,000 to $250,000. The $1 million maximum in the Sherman Act is still the effective maximum-dollar fine for a corporate antitrust offender, however. In addition, the new laws provide an alternative maximum fine for both individual and corporate antitrust offenders of twice the gross pecuniary gain or loss resulting from the violation, unless the imposition of such a fine would unduly complicate or prolong the sentencing process.

A second recent occurrence, of even greater significance to antitrust sentencing, was the promulgation by the United States Sentencing Commission of sentencing guidelines that courts are required to follow in sentencing antitrust offenders for crimes committed after November 1, 1987. Following a review of past sentences imposed in antitrust cases, the Sentencing Commission agreed with the Department of Justice that criminal antitrust sentences had been inadequate, and adopted an antitrust guideline intended to raise substantially both the fines and prison terms imposed for antitrust violations. With respect to fines, the Commission directed that organizational offenders pay fines of between 20 and 50 percent of their volume of commerce affected by the violation. Individual offenders are to be fined between 4 and 10 percent of their volume of commerce (or that of their principals) affected by the violation.

The substantial Sentencing Guidelines fines for antitrust offenses are, however, capped by the effective statutory maximums--in other words, if the full Guidelines fine would exceed the statutory maximum, it cannot be imposed. Thus, the question remains: Is $1 million or twice the gross gain/loss an adequate deterrent to potential corporate offenders, and is $250,000 or twice the gross gain/loss an adequate maximum fine for an individual offender?

Although the Guidelines apply to crimes committed after November 1, 1987, antitrust conspiracies are covert in nature and require considerable time and effort to uncover. As a result, the Department is only now bringing its first antitrust cases under the Guidelines. Nevertheless, using non-Guidelines' experience as a proxy, we can safely predict that, with respect to corporate offenders, the current Sherman Act $1 million maximum fines will by no means always be sufficient to permit courts to impose an appropriate Guideline sentence. Even the minimum Guideline fine will be unimposable on any organizational defendant whose affected volume of commerce exceeds $5 million, and the maximum Guideline fine will be unimposable where the defendant's affected volume of commerce exceeds $2 million. Although the commerce affected by many violations does fall within this range, it is not unprecedented in a large, nationwide price-fixing conspiracy to have hundreds of millions of dollars of commerce affected overall and to have many companies exceed the $2 million to $5 million level. There have also been conspiracies of a more local nature where the amount of commerce affected has justified corporate fines in excess of $1 million. While the same occasionally might be true for individual antitrust offenders, few individuals would have the ability to pay fines in excess of $250,000, and individuals should also be sentenced to terms of imprisonment. Fines, however, are the only effective sanction for organizations.

There is, of course, the "twice the gain, twice the loss" alternative maximum fine. The Department intends to use this alternative when it can. The major potential difficulty here is information. Gain or loss is not a necessary element of proof for per se antitrust crimes; harm is presumed given the nature of the violation. Thus, the Department traditionally has not investigated gain or loss or made factual damage presentations in its criminal cases. The often highly-complex issue of the degree of economic injury resulting from an antitrust offense is generally resolved in what can be protracted civil litigation. There are going to be cases where gain or loss can be readily computed, but these cases may turn out to be more the exception than the rule in criminal antitrust prosecution.

The Sentencing Commission itself has recognized this fact. It based sentences for antitrust violations on the volume of commerce affected by the offense rather than on gain or loss stating: "The offense levels are not based directly on the damage caused or the profit made by the defendant because damages are difficult and time consuming to establish." Background to Sentencing Guideline §2R1.1. Thus, computation of a twice-the-gross-gain/loss fine could often unduly complicate or prolong the sentencing process, and effectively be unavailable as an alternative to the statutory $1 million maximum.

For these reasons, the Department of Justice supports an increase in the maximum organizational fine for an antitrust violation to $10 million. This increase would reflect the increasing general concern with white collar crime that has resulted in very substantial increases in the penalties for other such crimes in recent years. It also would take into account the fact that the $1 million maximum fine for Sherman Act violations--long considered serious enough and potentially lucrative enough to warrant very high maximum fines--has not been increased in 15 years. And it would increase the ability of the courts to impose the fines that are provided in the new Sentencing Guidelines. There is a real need to increase maximum antitrust fines for organizations, and $10 million would be an appropriate figure.

The Department also has no objection to increasing the maximum antitrust fine for individuals that is set out in the Sherman Act itself from $100,000 to $250,000, as proposed in S. 995. It should be noted, however, that individuals who violate the Sherman Act currently may be fined this same maximum of $250,000 under the Sentencing Reform Act of 1984. *See* 18 U.S.C. 3751(b).

HART-SCOTT-RODINO AMENDMENTS

S. 995 also contains several amendments to the Hart-Scott-Rodino Act, which requires parties making substantial acquisitions of stock or assets to first report their proposed acquisitions to the Department of Justice and the FTC, and wait a prescribed period before consummating the acquisitions so that they might be reviewed for possible violations of the antitrust laws.

Partnership Loophole

One provision in S. 995 seeks to close whatever may remain of the so-called "partnership loophole" in the premerger notification program. It is similar in this respect to S. 431 as amended and reported in the 100th Congress. We believe that this legislation is unnecessary, and that while the approach taken may address some of the concerns that we expressed in connection with other proposals for such legislation (see the Department's March 17, 1987 letter to Chairman Metzenbaum with respect to S. 431 as introduced), it may still create problems.

Prior to amendment of the premerger notification rules in 1987, a newly-formed partnership that had few assets other than cash may have been able to undertake a large acquisition without first reporting it under the Hart-Scott-Rodino Act, regardless of the size of the individual partners or their equity interests in the partnership. This situation, which came to be known as the "partnership loophole," resulted from viewing the partnership itself as the acquiring person (because no one was deemed to control a partnership) and as having assets and sales that were less than the relevant size-of-person threshold (because cash accumulated to make the acquisition was not counted). A corporation, on the other hand, for Hart-Scott-Rodino purposes has always been deemed to be controlled by anyone holding 50 percent of its voting securities. Such a controlling shareholder would thus be considered to be the acquiring person, and its assets and sales would be counted in applying the relevant size-of-person test.

The FTC, with the Antitrust Division's concurrence, responded to the partnership loophole problem in 1987 by amending its rules essentially to provide that persons with ownership interests of 50 percent or more of partnerships are deemed to control such partnerships. Those persons are now required to report acquisitions by the partnerships they "control," just as persons must report acquisitions by corporations they control.

The current rule does leave open the possibility that large acquisitions may go unreported if undertaken by any entity (partnership or corporation) that does not itself exceed the relevant size-of-person threshold and is not controlled (i.e., 50 percent owned) by anyone else. Indeed, some large acquisitions have gone unreported. Experience under the amended rule has led the FTC to publish in the Federal Register an Advance Notice of Proposed Rulemaking seeking comment on whether the current rule creates a problem for antitrust enforcement, and on five possible rulemaking approaches to solving it. See 54 Fed. Reg. 7960 (February 24, 1989).

I would note that the fact that some large acquisitions may not be reported under Hart-Scott-Rodino is not necessarily a significant antitrust enforcement problem. Acquisition transactions typically are of antitrust concern only when they combine substantial businesses. It was for this reason that Congress required premerger notification only of acquisitions exceeding a certain size, and only by and from persons exceeding a certain size. The Hart-Scott-Rodino regulations that relate to acquisitions by newly-formed partnerships are founded on these principles. The Department believes that action of any kind (rulemaking or legislative) to expand Hart-Scott-Rodino coverage in the partnership area would be appropriate only if we appear likely to miss transactions of antitrust significance.

If the review of comments received on the FTC's Notice and further analysis leads to the conclusion that some action should be taken to expand Hart-Scott-Rodino coverage of acquisitions undertaken by partnerships, the Department believes that rulemaking would be a far better choice than legislation. With rulemaking, should any problems of underinclusiveness or overinclusiveness be detected, the rules readily could be tailored to the need. On the other hand, particularized legislation designed to close any remaining loophole would be more difficult to modify and could be construed as intended to "occupy the field," precluding subsequent rulemaking refinements.

When Congress enacted the Hart-Scott-Rodino Act, it set out only the broad outlines of a premerger notification program and left filling in the important details to the FTC, with the concurrence of the Department. We believe that the treatment of acquisitions undertaken by partnerships is the type of matter that can best be handled by the antitrust enforcement agencies through rulemaking.

Size-of Person and Size-of-Transaction Thresholds

S. 995 would raise two of the size thresholds in the Hart-Scott-Rodino Act that determine whether premerger notification of a particular acquisition is required. The size-of-person threshold (for the smaller of the parties to an acquisition transaction) would be increased from $10 million to $15 million. The size-of-transaction threshold would be increased from $15 million to $30 million.

The Department supports the size-threshold increases that are proposed in S. 995. It is appropriate periodically to examine and adjust specific dollar thresholds in regulatory statutes to account for inflation and changed circumstances, as S. 995 would do.

We recognize that any meaningful Hart-Scott-Rodino size threshold could result in some competitively significant transactions going unreported. This is primarily because even relatively small transactions between relatively small parties can have real competitive significance in relevant markets that are themselves small. While lower size thresholds perforce result in more competitively significant transactions being reported, they also result in the overall cost of the Hart-Scott-Rodino program to both the government and the business community being correspondingly greater.

The current Hart-Scott-Rodino size thresholds reflect a cost/benefit balance drawn by Congress in 1976, and those thresholds have not been updated since then. Without such updating, premerger notification requirements will gradually extend to smaller and smaller parties and transactions without any decision by Congress to shift the cost/benefit balance in that direction.

Waiting Periods

S. 995 would make two types of changes in the Hart-Scott-Rodino waiting period. First, the bill would lengthen the waiting period for transactions structured as cash tender offers. Currently, the waiting period for such transactions is 15 days plus an additional 10 days beyond compliance with a "second request" by the Department or the FTC for additional information (as compared to 30/20 for all other transactions). S. 995 would increase each portion of the cash tender offer waiting period to 20 days.

Second, S. 995 would authorize courts to extend the waiting period for any type of acquisition transaction for up to 25 days if, due to the complexity or scope of the information or documents to be evaluated, the Department or the FTC reasonably requires such time to determine whether the proposed acquisition may violate the antitrust laws.

The Department has found that although waiting period expiration frequently puts pressure on investigating staffs, the current periods are almost always adequate for any necessary investigation. In those instances in which waiting period expiration has been most pressing, with the parties ready and anxious to consummate their transactions, we generally have been able to negotiate what in effect are waiting period extensions because the parties did not want to force the Department to decide prematurely whether to bring a suit and seek a temporary restraining order to guard against consummation of a potentially anticompetitive merger.

While waiting period expiration occasionally presents problems, substantial increases in the waiting period could impose significant economic costs. Our antitrust laws must not pose an unnecessary obstacle to the prompt consummation of efficiency-enhancing acquisitions that are not anticompetitive and that increase the ability of American firms to compete both domestically and internationally. These concerns led the Department to oppose the substantial increases in the waiting period that were proposed in S. 432 as introduced in the 100th Congress. The waiting period provisions in S. 995 are, however, more modest and better targeted to providing the antitrust agencies with the additional time they may require to investigate unusually complex transactions. Accordingly, the Department has no objection to the waiting period provisions of S. 995.

Penalties and Equitable Relief

S. 995 would raise the maximum civil penalty for Hart-Scott-Rodino violations to $100,000 per day from the current $10,000 per day. The Department's Hart-Scott-Rodino enforcement experience indicates that the $10,000 per day civil penalty currently authorized may not adequately deter some HSR violations.

Persons considering acquisitions may calculate that the profits they expect to make by not making a HSR filing may exceed the maximum penalty that could be imposed if they were found to have violated premerger notification requirements. For example, a person hoping to buy publicly-traded stock secretly and cheaply may profit substantially by not making a HSR filing because the HSR rules require prior notice to the issuer whose stock would be acquired, and such notice could substantially increase the price that would have to be paid for the stock. If failure to file resulted in an HSR violation lasting 100 days, for example, under existing law the maximum civil penalty would be $1 million, and far more than that might be made by buying the stock secretly. I don't mean to suggest that people are baldly ignoring premerger notification requirements because of such calculations, but large potential profits may tempt some to skate dangerously close to line, and perhaps over it. Increasing the maximum civil penalty could provide additional deterrence in such situations.

At the same time, however, too high a maximum penalty could provide too much deterrence--it might cause acquiring persons to err too much on the side of caution and file premerger notifications unnecessarily. This would be a problem for the Department and the FTC, as well as the business community. Further, we are concerned here with deterring violations in a regulatory regime that is in some respects fairly intricate, rather than deterring criminal behavior. Of course, increasing the maximum penalty does not mean that courts would always have to impose that maximum--they would retain discretion to impose lesser penalties in appropriate cases, and the Department for its part would have discretion to seek less than the maximum authorized.

In light of all these considerations, the Department believes the maximum dollar civil penalty should be increased. While it is difficult to assess just what maximum would be optimal, the $100,000 per day proposal in S. 995 appears to be a reasonable one.

S. 995 also would amend the section of the Hart-Scott-Rodino Act that provides for civil penalties (section 7A(g)(1) of the Clayton Act) to provide that civil penalties of up to $100,000 per day would be "in addition to such equitable relief as the court finds appropriate." Because equitable relief--premerger notification compliance, waiting period extension, and other relief deemed necessary or appropriate--is already available under subsection (g)(2), there is ambiguity as to the intent of this provision. It may be intended only to make clear that civil penalties and equitable relief may be granted in the same action. However, authorization of "equitable relief" within the (g)(1) civil penalty provision may be intended to provide for equitable relief of a monetary nature in a civil penalty action, in particular, the disgorgement of profits--to whom is unclear--made as a result of an HSR violation.

The courts have not had occasion to consider disgorgement as a remedy for violations of the Hart-Scott-Rodino Act. The Department has heard arguments that disgorgement is not really "equitable" relief: Equitable remedies are supposed to return wrongful gains to injured parties, deterrence-based disgorgement to the government is more punitive than equitable, and disgorgement to investors is not an appropriate equitable remedy because the premerger program is intended solely to facilitate antitrust enforcement, and not to protect investors.

We believe that if some form of disgorgement is to be authorized by S. 995, it should be authorized explicitly. At this time, however, the Department has not determined whether such legislation would be appropriate.

Civil Penalty Enforcement

S. 995 would amend the Hart-Scott-Rodino Act so as to allow civil penalties to be recovered in suits brought by the United States "or the Federal Trade Commission." Presently, civil penalties for HSR violations may be recovered only in actions brought by the United States.

As introduced, S. 995 is somewhat ambiguous with respect to whether it would authorize the FTC to commence HSR civil penalty actions on its own, using its own attorneys, or merely give the FTC standing to seek such remedies, with any cases brought in its name being litigated by the Department of Justice. Based on Chairman Metzenbaum's introductory remarks, it appears that actual litigating authority is intended. Thus, this provision involves weighing the benefits of centralizing litigation authority within the Department of Justice against the cost of that centralization. 1/ The benefits of centralization are clear. It allows the Government to speak with one voice in court. This permits it to present a uniform

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1/ Centralization of litigation authority in the Attorney General can be traced to the Act establishing the Department of Justice in 1870. 16 Stat. 162 (June 22, 1870). Among the current statutory provisions setting forth the plenary authority of the Attorney General over the government's litigation are 28 U.S.C. §§516 and 519 and 5 U.S.C. §3106. Congress has, however, over the years enacted numerous statutory exceptions to that plenary litigating authority.

position on important legal questions. Moreover, the existence of this central authority promotes the goal that one officer, the Attorney General, be in a position to ensure consideration of the potential impact of litigation upon the government as a whole.

The main cost of centralizing Hart-Scott-Rodino civil penalty litigating authority within the Department of Justice is the delay and duplication of effort that it may entail. While the Department tries to bring HSR civil penalty cases referred by the FTC expeditiously, we must, as a law enforcement agency, give the highest priority to litigation where time is critical--namely criminal enforcement and merger enforcement undertaken before anticompetitive transactions are consummated. Because of this necessity, and because HSR enforcement cases may involve difficult factual or legal questions, it has sometimes taken several months for the Department to bring Hart-Scott-Rodino civil penalty cases referred to it by the FTC. Lengthy litigation of such cases has not yet been necessary, but we would hope to minimize duplication of effort by the use of FTC attorneys to assist the Department in such litigation.

There is legislative precedent for allowing the FTC to bring its own civil penalty suits. Under the Federal Trade

Commission Act, the FTC may bring some civil penalty actions itself where the Attorney General is notified and does not commence the action within 45 days. See 15 U.S.C. § 56. Similar conditional Commission litigating authority may be an appropriate way of accommodating all of the relevant concerns with prompt, effective HSR enforcement. Appropriate conditions on such authority would be particularly important here, however, because the Department of Justice has a strong, independent interest in the Hart-Scott-Rodino program: We must concur in the HSR regulations and in their formal interpretation, and we bring enforcement actions in the courts in cases we ourselves investigate. Thus, the need for uniformity in presenting the government's positions to the courts is particularly relevant in this context.

In light of all of the relevant considerations, we would not oppose legislation that would authorize the FTC to commence on its own a HSR civil penalty enforcement action 45 days after notifying the Department of Justice of its intent to do so if, during that 45 days, the Department had neither commenced the action itself nor advised the FTC that the Commission's own commencement of the action would be inconsistent with Department enforcement policy designed to assure uniformity in judicial application of the Hart-Scott-Rodino Act. The legislation could also provide for a shortening of the 45 day period where the Department and the FTC agree that a proposed civil penalty action should be promptly commenced by the Commission itself.

Filing Fees

S. 995 would require the acquiring person in a transaction that must be reported under the Hart-Scott-Rodino Act to pay a filing fee of 1/50 of one percent of the value of the transaction. The FTC would establish by rule the filing fee for transactions in which the precise value is not known. In no event would the filing fee exceed $50,000. All fees collected pursuant to S. 995 would be divided evenly between the Department and the FTC and made available for antitrust enforcement.

If Congress decides that it is appropriate for the costs of government prior review of mergers and acquisitions to be borne by firms that engage in such transactions, we would have two reservations with the filing fee provision of S. 995. The Department's first concern is with the legislating of the rate schedule. It is the Administration's experience that rate schedules are usually best set by the rule-making process. Allowing the rate to be set administratively lends flexibility to the process. This may be especially important in the case at hand given the uncertain nature of merger activity, and the resulting fluctuations of filing fee receipts, which would be an inevitable characteristic of the program.

The Department's second concern is related to the reliance upon such fees for antitrust enforcement. Since receipts would be unpredictable, it would be unwise to supplant appropriations with fees to finance program activities. We would, therefore, suggest a clarification of proposed Sec. 7B(b) to read:

> All fees collected pursuant to the provisions of this section shall be deposited into the Treasury. Beginning October 1, 1990, amounts collected will be made available to the Department of Justice and to the Federal Trade Commission for the enforcement of the antitrust laws to the extent provided in advance by appropriations acts.

This language assures that the proceeds collected by the fee will be used for antitrust enforcement, and that the enforcing agencies will be assured of an adequate funding level through the annual appropriation of the filing fees, as well as regular appropriations. Uncertainty regarding the amount of filing fees would not result in uncertainty for the total appropriations for the Department or the FTC. Congress would enact specific appropriations, which would be funded out of the fees and the regular appropriations process.

TREBLE DAMAGES FOR THE UNITED STATES

The third bill under consideration by the Committee today, S. 996, would amend section 4A of the Clayton Act to provide treble damages for the United States when it is injured by an antitrust violation. Although other injured parties have been able to collect treble damages for their antitrust injuries since the antitrust laws were enacted, the United States has had the right to seek antitrust damages only relatively recently and may seek only actual damages. We are increasingly discovering price fixing and bid rigging in federal government procurement resulting in overcharges to the United States, and believe that it is time to put the United States on a par with other parties who suffer such injury. We thus support enactment of S. 996.

Treble damages can serve important concomitant compensatory and deterrent purposes. Along with the award of attorneys' fees to prevailing plaintiffs, they increase the incentive for injured persons to bring suit to recover their losses. Antitrust litigation is costly and complex, and antitrust defendants are often large, well-financed firms. Treble damages significantly offset the risks inherent in civil damage litigation, and create a legal regime in which meritorious lawsuits are highly likely to be brought, increasing the chance that victims of antitrust violations that are discovered will be made whole. At the same time, they make it less likely that antitrust violators who are discovered will be able to pocket their ill-gotten gains, and thereby help to deter antitrust offenses.

From the general deterrence standpoint, the trebling of damages also in practice compensates somewhat for the fact that not all antitrust violations are discovered. Knowing that, in the event of discovery, any action brought to recover antitrust damages will be for three times the damages caused by the violation makes committing an antitrust violation a poorer business risk right from the start.

Thus, treble damages not only improve the likelihood that those injured by antitrust violations will be adequately compensated; they also complement criminal penalties in deterring such violations in the first place. The issue presented by S. 994 is whether the compensatory and deterrent purposes of trebling damages should also be pursued with respect to the price-fixing and bid-rigging antitrust violations that are injuring the United States, or whether there is something so unique about the United States as a victim that trebling is inappropriate.

Currently, the United States recovers only actual damages for its injuries under the antitrust laws. It has had this ability since 1955, when Congress passed legislation that reversed the effect of *United States v. Cooper Corp.*, 312 U.S. 600 (1941), in which the Supreme Court held that the United States was not a "person" within the meaning of section 4 of the Clayton Act and thus was not entitled to recover treble damages under that section for its antitrust injury. The actual-damages-only feature of the 1955 legislation was premised on the assumption that the United States did not need the additional encouragement to pursue damage actions that treble damages provides to potential private plaintiffs. The extent to which this is true, of course, is debatable: Antitrust damage litigation involves costs and risks to the United States just as it does to other potential plaintiffs. Moreover, encouraging plaintiffs who discover their injuries to actually pursue damage actions is but one of the antitrust deterrence aspects of trebling damages.

The simple truth of the matter is that potential treble-damage liability in antitrust damage actions brought by the United States will deter price fixing and bid rigging directed against it to a greater extent than potential actual-damage liability. 2/ And the simple fact of the matter is that the United States needs the added deterrence that treble damages can provide. Numerous bid-rigging and price-fixing violations involving federal procurement have already been uncovered, and additional violations keep turning up. As I noted earlier in my testimony, the Department is actively engaged in using the antitrust laws to prosecute government procurement fraud, with over 40 ongoing grand juries involving widely diverse product and geographic markets. The United States needs to put in place a strong disincentive that will discourage businesses from entering into price-fixing and bid-rigging conspiracies directed against the federal government. It makes little sense to have an enforcement system that makes the United States a less risky and thus more profitable target for antitrust violations than private parties, but that is what the current system provides. If those who do business with the federal government are aware that the Department of Justice will seek treble damages as well

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2/ In some cases, the United States may be able to seek treble damages for antitrust injury because of coincident violations of the False Claims Act, 31 U.S.C. 3729 et seq., as most recently amended in 1986. That a treble-damage remedy may sometimes be available under another statute does not mean that it should not be generally available in all antitrust cases, however.

as criminally prosecute individuals and firms that fix prices and rig bids on federal contracts, they may finally conclude that the financial risk of entering into such activities is too great and refrain from doing so. Therefore, whether or not the decision to give the United States a right to recover only actual damages for antitrust injuries was correct in 1955, we believe that treble damages should be authorized today. We strongly endorse enactment of S. 996.

Mr. Chairman, this concludes my prepared remarks. I would be happy to address any questions at this time.

Senator **Metzenbaum**. Thank you, Mr. Rill.

One question and then I am going to have to take an important phone call that has just come in.

Your voice got a bit stronger when you said that if Congress decides to increase the fees, as if somebody had the opinion that if there are going to be any fee increases, you in Congress have got to accept all the responsibility.

Query, if we in Congress decide to do so, will we be doing so with the administration's cooperation and support?

Mr. **Rill**. Mr. Chairman, I simply cannot answer that question at this time. As you know, the filing fee issue is an issue that transcends a variety of areas in addition to antitrust. I think it is a policy judgment that needs to implicate a variety of concerns both from the standpoint of taxation issues, budgeting issues, similar issues that I am not in a position to address from a policy standpoint at this time.

My principle concern is that if the judgment is made by whatever powers that be that filing fees for Hart-Scott-Rodino filings be imposed, that they not be used for the reasons I set forth in the statement, to substitute for money that would be available for antitrust enforcement.

Senator **Metzenbaum**. I understand that and I think we could accommodate that. I would appreciate your advising us as to whether or not there would be a scintilla of criticism or comment from the White House or anyone related to the White House, or the administration criticizing the Congress if we were to make this increase.

We do not want to be a party to doing that which we think your Department and the FTC needs to have done only to wind up becoming the brunt in a political issue. We are perfectly willing to accept the responsibility on a, if not shared basis, on a basis of an understanding that it will not become the focus of criticism from those down the street.

Mr. **Rill**. I can only say that at this time there has been neither criticism nor approbation as a policy matter on this broad issue, and certainly I would undertake to inquire along the lines you request.

Senator **Metzenbaum**. Appreciate it.

Mr. **Rill**. Thank you.

Senator **Metzenbaum**. This committee will stand in recess for 5 minutes.

[Recess.]

Senator **Metzenbaum**. Let me ask you, Mr. Rill, do you, as one who just left the private practice, do you feel that the higher penalties proposed in S. 995 are sufficient to signal to business and to the courts that Congress considers antitrust violations to be very serious offenses? Or put it another way, assuming your former hat, would this be the kind of thing that would cause you to give much greater alarm signals to your clients' activities?

Mr. **Rill**. Absolutely. A ten-fold increase in the maximum corporate fine together with the guideline type of approach that would permit and indeed impel the courts to get up to or hit that dollar cap is the sort of thing that I would take to the corporate clients that I represented and say, "Look, this is getting much more serious now and the time that we need to undertake and develop and promote compliance programs is something that we urge you to undertake."

I think that it may be that antitrust compliance has not been fully as high on the corporate agenda as it should have been. I think by sending this kind of a message, a ten-fold increase, plus the increasing applicability of the guidelines will be a message heard in the top levels of corporate management and that will encourage the allocation of resources to the sort of compliance program, compliance manuals, education programs that all of us in private practice have been involved in and I think produce more of that, which I think is probably a very effective deterrent for antitrust offenses.

I think yes is the short answer to your question. It will be heard.

Senator METZENBAUM. I inquired of you concerning the question of whether or not the individual fine could be reimbursed by the corporation and you indicated you were not quite sure about the answer to that, at least that is the way I interpreted your answer.

Mr. RILL. That is correct.

Senator METZENBAUM. Do you think it would be a salutary move on our part to provide in the legislation that corporations were precluded from reimbursing the individual?

Mr. RILL. I regret I really have not given a lot of thought to that. I think that one would have to balance the additional deterrent effect that that may have against whatever other policies there may be in the intramural relationship between the corporation and the employer.

And I will examine that, and if I may, get back to you on it.

Senator METZENBAUM. Promptly.

Mr. RILL. I still think, of course, that the major deterrent to the individual has to be jail time, but I will have to get back to you on that.

Senator METZENBAUM. I would appreciate it if you would.

I think at this point we are going to turn to Mr. Calvani and then perhaps come back to you, Mr. Rill.

Mr. Calvani, we are very happy to have you with us, sir, and please proceed.

STATEMENT OF MR. CALVANI

Mr. CALVANI. Thank you, Mr. Chairman. I am delighted to be here this morning to present the views of the Federal Trade Commission on Senate Bills 994, 995 and 996.

I should note preliminarily that Commissioner Azcuenaga has dissented from these comments and will forward, or has forwarded a separate statement to the committee.

While the prepared submission of the Commission represents its official views, my oral remarks and responses to your questions are obviously my own.

I am particularly pleased, Mr. Chairman, to share the panel this morning with the Hon. James F. Rill, the new Assistant Attorney General for Antitrust. I have had the good pleasure of knowing and working with Jim for a good many years. I look forward to working with him now and I am sure you do too.

Mr. Chairman, with your permission, I would like to submit the Commission's formal statement for the record and make very few brief comments.

Senator **Metzenbaum**. Without objection, the entire statement will be included in the record.

Mr. **Calvani**. Thank you, Mr. Chairman.

Rather than repeat what Mr. Rill has just said, I would like rather quickly to indicate our areas of agreement and to use my limited amount of time to focus on the very few subjects where we might have differing views.

I am pleased, Mr. Chairman, to say at the outset that the Commission endorses all three bills.

Senator **Metzenbaum**. Great.

Mr. **Calvani**. We share the Department's endorsement of S. 994, which treats interlocking directorates, and S. 996, which provides treble damages for the United States.

Quite frankly, some members of the Commission might have proposed a slightly different version of the Section 8 amendments, but we nevertheless support your bill, Mr. Chairman, as a very reasonable solution to a significant problem.

Now let me turn to S. 995. We join the Department in supporting an increase in criminal fines for violations of the Sherman Act. We support the increase in the size thresholds for Hart-Scott-Rodino that determine the necessity for premerger notification. And we support the extension of the HSR waiting periods. We also join the Department in supporting the increase in the maximum civil penalty for HSR violations. Thus, Mr. Chairman, our position is, in the main, quite like that of our sister agency.

Permit me now to make four brief observations on where we may differ. And quite frankly, following Mr. Rill's testimony, I am not altogether sure we have differences. They may be just differences of emphasis.

First, the Commission does not oppose the closing of the so-called partnership loophole. Mr. Chairman, you may recall that I testified in opposition to a similar provision that you had introduced before your committee on February 26, 1987, some 2 1/2 years ago.

At that time, I thought that the changes in the HSR regulations then being proposed by the Federal Trade Commission would cure the problem. You disagreed with me.

I recall, Mr. Chairman, that you posed a hypothetical that involved partners with less than 50 percent interest, and I think offhandedly I joked that I thought maybe somebody had bugged my office before my appearance here.

I surmised that I might have a leak on my staff or something.

Quite frankly, I did not think your hypothetical was very real, but promised that the proposed changes in the FTC regulations would solve the problem.

Mr. Chairman, your hypothetical has taken on life and it represents very real fact situations. I encountered your hypothetical only a short time ago in a very real case and have reason to believe that it is becoming more common.

Now the FTC currently has again proposed regulations to try to fix the loophole. The fact of the matter, however, is that some 30 months have elapsed since my appearance before you and the problem remains.

While I believe theoretically that regulation is better suited to fixing this problem than legislation because it could be more flexible, I cannot sit here today and oppose congressional action.

I would ask, however, Mr. Chairman, that the committee give some thought to adding language to the proposed statute that would permit us by regulation to tailor this provision in the event that it catches lots of rough fish that we have no business examining, or inadvertently permits a few to escape our net that we would currently catch.

I am informed by our staff in the HSR Office that the proposed statutory language in the bill may, and I want to underscore "may", create yet inadvertently another loophole. And I would ask only that you permit Commission staff to confer with your staff prior to any markup to ensure that additional problems are not created, and I think this can be done quickly.

Senator **METZENBAUM**. Be happy to do that.

Mr. **CALVANI**. Thank you, Mr. Chairman.

Second, the Commission supports the provision for equitable relief for HSR violations. Inconsistencies between the HSR reporting requirements and the disclosure provisions of the Williams Act create a financial incentive for acquirers of stock and potential takeover targets to violate the Hart-Scott-Rodino statute.

Very often, we see cases where a group of individuals will not make an HSR filing in order to permit them to purchase stock at a lower price than would prevail if the target and the market were aware of these events.

In our experience, the gains one may realize by secretly purchasing stock in excess of the HSR notification thresholds far exceeds the civil penalty that we can today impose on individuals as the consequence for violating the statute.

Often times, the maximum penalty available to the United States is but a fraction of the gains resulting from a failure to make a timely HSR filing. In short, HSR violations often times pay very well.

The express grant to the Commission of power to seek equitable relief for such violations would go a long way towards securing future compliance with the statute.

However, I do believe that Mr. Rill has a point as to the imprecision of the language in the proposed statute, and would suggest that the committee give some thought to further defining what is meant by "equitable relief." By defining this term explicitly in the statute, we would be better able to convince a court to construe this language in a manner consistent with what I think Congress intended.

Third, Mr. Chairman, the Commission does not oppose and indeed supports the provision for HSR user fees. As an abstract matter, some of us on the Commission oppose the imposition of user fees such as this. Nonetheless, here we appreciate that this user fee provision represents a compromise and is a part of an overall piece of legislative reform.

Noting this, the Commission supports the bill.

On this point, however, Mr. Chairman, I should candidly admit my concern that these new moneys actually be made available to the Federal Trade Commission and to the Division. What your committee giveth, the appropriations process should not be permitted to taketh away. The provision can only be justified if it actually makes new moneys available for the enforcement agencies.

And lastly, Mr. Chairman, the Commission supports FTC independent litigating authority for HSR violations. Quite frankly, we have had some difficulty obtaining timely responses from the Department of Justice on our referrals of HSR violations.

I do not mean this as a criticism of Mr. Rill. He has been at the Department only for a very short time, or for that matter, a criticism of his Department. Mr. Rill indicated in his prepared testimony that the Division has many types of matters enjoying high priority.

Nevertheless, we have four HSR matters currently pending at the Department of Justice, two of which are approaching their 1 year anniversary.

Moreover, the grant of independent litigating authority to the Commission may increase our effectiveness in negotiating with HSR violators who would no longer be able to take a second bite of the apple once they begin renegotiating with the Department of Justice. As you can see, Mr. Chairman, independent litigating authority would help ameliorate this problem.

I appreciate the opportunity to be with you this morning and look forward to answering your questions.

[The statement of Mr. Calvani follows:]

PREPARED STATEMENT
of the
FEDERAL TRADE COMMISSION
presented by
THE HONORABLE TERRY CALVANI
COMMISSIONER
before the
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

July 25, 1989

Good morning, Mr. Chairman, and members of the subcommittee. I am pleased to have the opportunity this morning to deliver the prepared statement of the Federal Trade Commission.[1]

We understand that this hearing has been called to consider three separate bills to amend the Clayton Act.[2] S. 994 concerns interlocking directorates, S. 995 pertains to criminal fines and pre-merger notification requirements, and S. 996 relates to the damages recoverable by the United States under the Clayton Act for injury to its business or property. We are pleased to support all three bills.[3]

S. 994 -- Interlocking Directorates

The principal antitrust provision that now governs interlocking directorates is Section 8 of the Clayton Act,[4] which prohibits interlocking directorates under certain circumstances.[5] Section 8 now prohibits a person from serving as a director of two or more corporations if the following two conditions are met: (1) the capital, surplus and undivided profits of any one of the corporations aggregate more than $1 million; and (2) the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws." Both the individuals who sit on the boards of competing corporations and the corporations that share directors with their competitors are subject to liability under Section 8.

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[1] This prepared statement represents the views of the Commission, Commissioner Azcuenaga dissenting. (Separate statement to follow). Any additional comments that I may make throughout this hearing in response to questions asked by members of the subcommittee or otherwise are my own, and do not necessarily represent the views of the Commission or of any other Commissioner.

[2] 15 U.S.C. § 12 et seq.

[3] Were the Commission or any of its members assigned the task of drafting legislation as comprehensive as that which is the subject of today's hearings, the final product might differ somewhat from that contained in S. 994, S. 995, and S. 996. The Commission recognizes, however, that compromise is a necessary part of the legislative process. We believe that the three bills, taken together, substantially improve the antitrust landscape.

[4] 15 U.S.C. § 19.

One of the major deficiencies of the present Act, which S. 994 proposes to remedy, is its limitation to interlocks involving corporate directors. The principal antitrust concern that arises when competitors share policymaking personnel is that the firms can more easily coordinate their strategic economic decisions in order to benefit their private interests at the expense of consumer welfare.[6] For that reason, the interlocks covered by the statute should include not only directors, but officers who participate in deciding competitive strategy.

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[5] Section 8 contains special provisions applicable solely to banking institutions. It also entirely excludes from its coverage common carriers subject to regulation under the Interstate Commerce Act, as amended.

[6] An interlock between firms may be viewed as an especially convenient method of fixing prices, with the interrelated official serving to facilitate the coordination of pricing decisions and to detect any cheating on the joint strategy.

Indeed, because corporate managers are more likely than directors to be involved in decisions with respect to pricing and other elements of firms' competitive behavior, restrictions on interlocks among other personnel may be more important than those imposed on interlocks among directors. For these reasons, we think that the proposed amendment of Section 8 to cover interlocks of officers as well as of directors is an excellent idea.

Under the proposed legislation, the restrictions of Section 8 would be triggered only if each of the competing firms had capital, surplus, and undivided profits of more than $10 million; currently, the restrictions apply if any of the firms has capital, surplus and undivided profits of more than $1 million. This, too, is a desirable change. In today's economy, the existing threshold extends coverage of the provision to interlocks that pose little danger of serious consumer injury. The proposed threshold adopts a more realistic standard of potential harm.

S. 994 would exempt from its prohibition those interlocks in which any of three conditions is satisfied: (1) the competitive sales of either corporation are less than $1 million; (2) the competitive sales of either corporation are less than 1 percent of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4 percent of their total sales. Like the bill's proposed increase in threshold, this provision is designed to remove from the coverage of the interlock prohibition those relationships that pose little risk of significant anticompetitive harm.

We support this objective. Moreover, exemptions are particularly important in light of the bill's retention of the per se prohibition of interlocks. Given the broad reach of the present standard, an exemption designed to allow interlocks that pose negligible risk of anticompetitive harm is highly desirable.

S. 994 also contains a provision that would adjust, based on annual changes in the gross national product, the $10 million threshold specified for applicability of the interlock prohibition and the $1 million threshold established for exemption from the prohibition. We support the concept embodied in this provision -- that restrictions on business conduct should remain firmly grounded in the economic reality of the day. Inflation adjustment would help ensure that the thresholds set forth in this bill do not become quickly outdated, and the bill's requirement that the Federal Trade Commission publish the adjusted numbers should minimize uncertainty. [7]

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[7] S. 994 would retain the exemption in Section 8 for common carriers subject to subtitle IV of title 49 of the United States Code. The referenced subtitle contains several restrictions on interlocks, (49 U.S.C. §§ 11321, 11322(a), 11348), the principal one of which requires Interstate Commerce Commission approval for interlocks of directors and officers. 49 U.S.C. § 11322(A). Because interlocks involving common carriers will continue to be regulated under the amended Interstate Commerce Act, the continuation of the exemption in Section 8 probably would have little practical effect.

S. 995 -- Criminal Fines and Pre Merger Notification

S. 995 would increase the maximum fines for criminal antitrust violations from $1 million to $10 million for corporations, and from $100,000 to $250,000 for individuals. We support these increases, especially the increase for corporate offenders. Congress set the current limits in 1974, and there can be little doubt that inflation during the last fifteen years has taken a toll on the adequacy of the ceilings Congress then found appropriate. A $1 million dollar limitation on the fine that can be imposed on a corporate violator does not reflect the amount of harm to the economy that can result from an antitrust violation today, and a $10 million ceiling would allow for a more realistic and effective deterrent.

S. 995 would also amend the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") in a number of ways.

Section 3(a)(1) of the bill would close the so-called "partnership loophole" under the HSR Act. Under current regulations, an acquisition by a partnership that does not have any assets other than those to be used for the acquisition, where the partnership is not "controlled" by any person who meets the size of person test, generally does not trigger a filing under the Act. The proposed amendment would effectively require filings where a general partner of the acquiring partnership would independently meet the size of person test. While flexible regulatory solutions are generally preferable to legislative reforms where changes in the scope of the HSR reporting requirements are deemed necessary, the Commission does not oppose the proposed amendment. However, we were informed by staff that the proposed statutory language may have some unintended faults. Accordingly, we would welcome the opportunity to meet with committee counsel to discuss the specific statutory language in this regard.

Section 3(b)(1) of the bill would raise the dollar thresholds of certain persons subject to the HSR reporting requirements from $10 million to $15 million, and of transactions from $15 million to $30 million.[8] These dollar thresholds have not been updated since Congress passed the HSR Act in 1976. As a general matter, periodic updating of these thresholds to account for inflation is desirable to avoid expanding the scope of the legislation to transactions that Congress never intended to reach.

We also welcome the proposed amendment in section 3(b)(2), which would extend the waiting period after HSR filing for acquisitions by cash tender offer from 15 days to 20 days. The five-day extension would allow Commission staff to review the data submitted and more carefully consider the need for additional information and further investigation of the transaction, without imposing a significant cost on the parties. Securities and Exchange Commission regulations under the Williams Act require tender offers to remain open for at least 20 business days, which will always be a longer period than the 20 calendar-day waiting period established in the amendment. Consequently, increasing the waiting period for cash tender offers should not delay their consummation.

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[8] We assume, for purposes of this discussion, that Congress appropriately set the threshold dollar requirements when it enacted the HSR Act of 1976.

Section 3(b)(3) would extend the HSR waiting period for cash tender offers when a request for additional information is issued from 10 days to 20 days after compliance with the request. This would establish the same waiting period for cash tender offers as now applies to all other acquisitions, though for tender offers the period will still commence when the acquiring person complies, whereas for other transactions the period commences when both the acquired and acquiring persons comply. This extension should give Commission staff a better opportunity to review responses thoroughly before deciding whether to challenge the transaction. Under current law, Commission staff may have to review an extraordinary volume of documents, assembled over a period of several weeks or even months, within a 10-day period, which can be an enormous burden. We have found that firms generally agree to delay closing their deals when we need extra time to evaluate the transactions. Nevertheless, a 10-day review period is unrealistic, and prescribing a 10-day extension should impose a minimal additional burden on firms that have already incurred a delay by responding to second requests.

Section 3(b)(4) would increase the maximum civil penalty for noncompliance with the HSR Act from $10,000 a day to $100,000 a day. Increasing the $10,000 ceiling is desirable. The proper level for that maximum is obviously a matter of judgment, but $100,000 seems to us within the range of reason.

Section 3(b)(4) would also make clear that the Commission may obtain equitable relief against violators of the HSR Act. This relief would include disgorgement of profits gained in acquisitions conducted in violation of the Act. This clarification of the Commission's authority should lead to increased compliance with the Act and, for that reason, we support it.

In addition, Section 3(b)(4) would grant the Commission independent authority to pursue both civil penalties and equitable remedies under the HSR Act. Such authority would aid the Commission in its ability to secure prompt relief against HSR violators.

Section 3(b)(4) would also give the Commission the authority to seek a court order extending the Commission's period for review of transactions by up to 25 days "due to the complexity or scope of the information or documentary material to be evaluated." In our experience, parties have voluntarily agreed to extend our review period when the volume or complexity of their submissions imposed a burden on us. Nonetheless, we welcome the provision, which should reduce the Commission's reliance on such voluntary agreements.

Finally, section 4 of the bill would impose a fee on parties who make pre-merger filings under the Act. The proposed filing fee would be very small relative to the value of the transaction and should not be unduly burdensome to the filing parties. We support this provision and would welcome the influx of additional resources to our merger enforcement program.

S. 996 - Treble Damages for the United States

Section 4A of the Clayton Act now permits the United States to recover only actual damages for injuries caused by antitrust violations. S. 996 would amend this provision to allow the United States to recover treble damages. We support this change. The prospect of actual damages does not create a sufficient deterrent to antitrust violations that result in injury to the business or property of the United States. Indeed, because private plaintiffs can recover treble damages, Section 4A now creates a perverse incentive to direct antitrust offenses toward the United States. S. 996 would properly place private parties and the United States on the same footing as civil antitrust plaintiffs.

This concludes the prepared statement of the Commission.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF
THE COMMISSIONER

July 25, 1989

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Antitrust, Monopolies and Business Rights
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I am writing to state my views concerning S. 994, S. 995 and S. 996 to amend the Sherman and Clayton Acts. These bills are important legislative initiatives, and I understand that you want to hear the views of the Commission at the hearing on July 25.

In an unprecedented action, a majority of the Commission has refused to allow me to indicate my separate views in the testimony of the Commission on S. 994, S. 995 and S. 996. I disagree with the majority's views in several respects, and I therefore am writing separately to respond to your letter of July 12, 1989.

I differ from my colleagues in three specific ways. First, with respect to S. 995, which would increase the maximum fines for criminal antitrust violations, the Commission has no expertise in the area of criminal violations of the law, and I assume, for purposes of discussion, that the existing fines set an appropriate level of deterrence when they were enacted in 1974.

Second, Section 3(b)(1) of S. 995 would raise the dollar thresholds of certain persons subject to HSR reporting requirements. I refer the Subcommittee to the Statement of the Federal Trade Commission Before the Subcommittee on Antitrust, Monopoly and Business Rights, Committee on the Judiciary, United States Senate, Concerning S. 431 and S. 432, February 26, 1987, for a discussion of the potential effect of Section 3(b)(1).

Finally, Section 4 of S. 995 would impose a "user fee" on persons making premerger notification filings under the Hart-Scott-Rodino Act. Unlike Chairman Oliver and my other colleagues on the Commission, I take no position on the imposition of a filing fee, which is a question of tax policy outside the Commission's area of expertise.

I appreciate this opportunity to state my views concerning this proposed legislation. I request that this letter be placed on the record. If I may be of any further assistance, please do not hesitate to call me.

Sincerely yours,

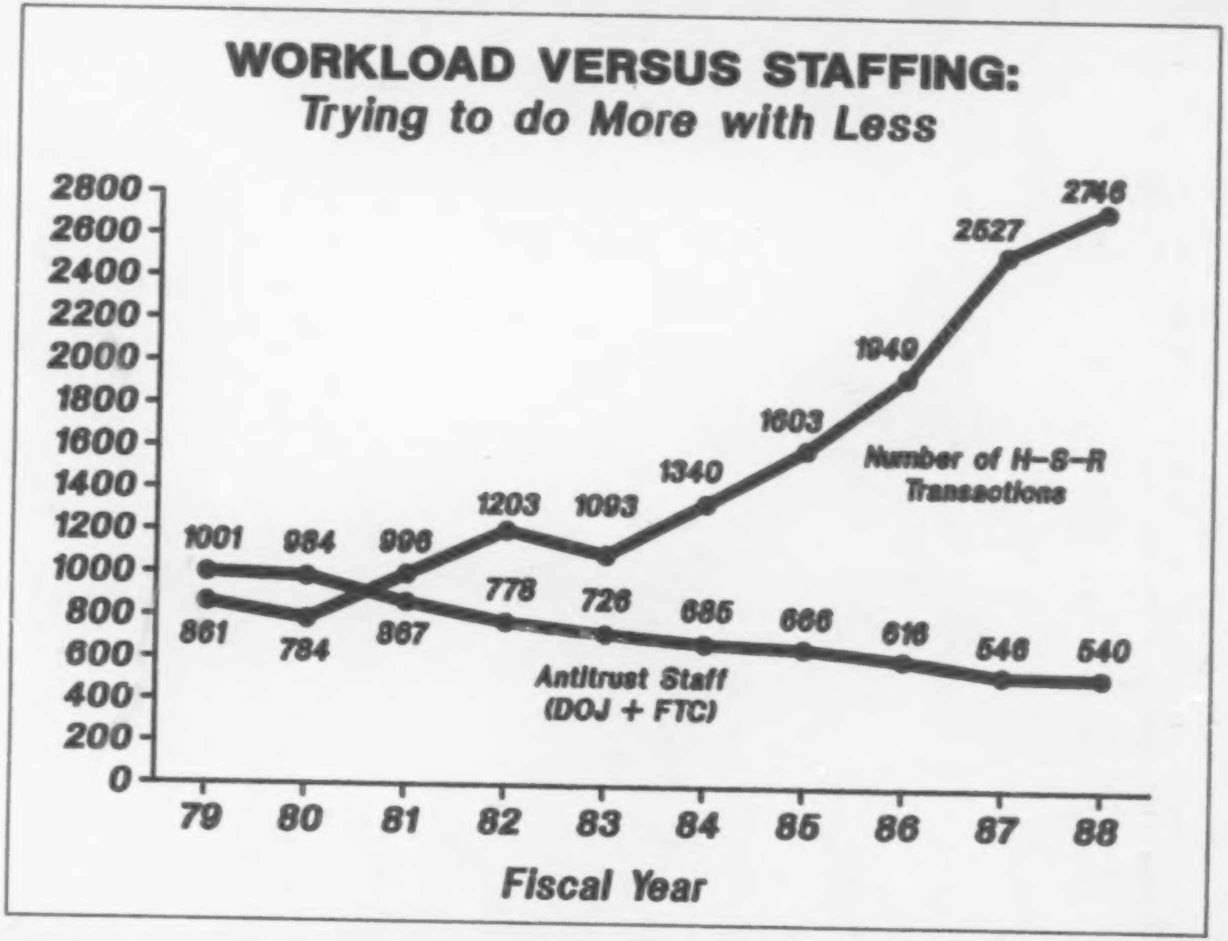
Mary Azcuenaga

Mary L. Azcuenaga

Senator **Metzenbaum**. Thank you very much, Mr. Calvani.

I believe at this point I will put into the record a duplicate of the chart that is up there indicating how there has been so much work under HSR and how the antitrust staff has actually gone down during that period.

[The chart of antitrust staff follows:]



WORKLOAD VERSUS STAFFING:
Trying to do More with Less

Senator METZENBAUM. Mr. Calvani, do you believe—I think you have already indicated this—that companies have deliberately refused under the premerger filing requirements so they can have more time to make money buying stock before others were put on notice? I think you pretty much indicated that.

Mr. CALVANI. Yes, Mr. Chairman, I do.

Senator METZENBAUM. The FTC has been through a bleak period during the last 8 years. Often it seemed more like the enemy of consumers rather than their protector.

Do you see some change of direction in this new administration?

I must say that the Chair is getting little shakes because I do not normally sit here and get this much support from the administration spokesperson. [Laughter.]

I am getting a little nervous and I have got to go back and read my bill again.

My question is—certainly the previous administration had a laissez faire kind of attitude. Every merger was OK upon its filing. There was very little emphasis coming from the very top and that kind of thing does permeate a whole administration.

Do you see any improvement in that respect during the present administration?

Mr. CALVANI. Well, Mr. Chairman, I was waiting for that. I knew that we could not make our way through this hearing without some area where you and I would disagree, although I must say that I share your impression that this is a somewhat unique hearing with us agreeing, at least to this point in the day.

Mr. Chairman, I do not share your view that the record of the agency over the past years has been a poor one. Indeed, as you know, I believe that the record has been a good one. I think that the legislation that you have introduced, together with that of Senator Thurmond, identifies some very real problems and we are pleased to join with you here in an effort for the common good to try to solve those problems.

As to whether the agency will take a new direction under new leadership, Mr. Chairman, I simply am not the right person to ask. As you know, the President has nominated two individuals to the agency, one of them who will serve as the Chairman of the agency. Confirmation hearings have not as yet taken place and I am simply not in the position to speak for the new Chairman.

Senator METZENBAUM. I appreciate the candor of your response.

We are talking about raising about $20 million with the new filing fees—I think that is the figure—which would be divided.

Would that fee provide a significant amount of money for the purpose of increasing staff?

Mr. CALVANI. Yes, Mr. Chairman. We are basically a labor intensive agency and most of our money goes to pay salaries. We do not have a lot of equipment. We are labor intensive. So that would assist us in significantly increasing the staff, if the Appropriations Committee does not regard this as new found money that it can use to substitute for moneys that would otherwise be appropriated. That is my great fear.

Senator METZENBAUM. I understand exactly what you are saying and before we move with this legislation, the Chair will explore with the Appropriations Committee their attitude and whether or not there would be any thought on their part of cutting back on your appropriations or not treating you the same as they treat other agencies of Government.

If I found that there was even any suggestion of doing that, I would have to reconsider the whole question because it is not a question of raising money for the purpose of raising money or to balance budgets. It is a question of raising money for the purpose of achieving the objective of your being able and the Antitrust Division being able to do the job which has been assigned to them.

Thank you very much, Mr. Calvani.

Thank you very much, Mr. Rill.

I would look forward to your respective staffs promptly getting back to us in connection with some of the suggestions that you have made to see if we can work those out.

I would also appreciate, Mr. Rill, and I think this comes more within your Department than Mr. Calvani's, your determining with some certainty that this question of raising fees will not in turn become a political issue that will be used by those who play politics with matters of this kind because unless I had those assurances, I would have some difficulty in moving this legislation and assuring my colleagues that we should do so.

Mr. RILL. I understand, Mr. Chairman.

Senator METZENBAUM. Thank you very much.

Mr. RILL. Thank you, Mr. Chairman.

Senator METZENBAUM. Our next witness is Malcolm Pfunder, Antitrust Section, the American Bar Association and William Dempsey, President of the American Railroad Association.

Mr. Pfunder, normally we ask our witnesses to confine themselves to something like 5 minutes. I think you have probably appeared before Senate Committees before. If you take a little bit longer, we will not get too uptight, but we will be glad to have your entire statement, as well as yours, Mr. Dempsey, included in the record, but we would like to have you confine yourself somewhere in the area of 5, 6, 7 minutes.

STATEMENT OF MR. MALCOLM PFUNDER, ESQ., ANTITRUST SECTION, AMERICAN BAR ASSOCIATION; AND WILLIAM DEMPSEY, PRESIDENT, AMERICAN RAILROAD ASSOCIATION, ACCOMPANIED BY JAY THOMAS TIDD, VICE PRESIDENT OF LAW

Mr. PFUNDER. Mr. Chairman, I would be happy to do so. I had the privilege of testifying before this committee in February of 1987, to present at that time my own views on some proposed changes relating to the Hart-Scott-Rodino Act.

As you may know, Senator, I was hired by the Federal Trade Commission in 1977, to set up and run the FTC's Premerger Notification Office and coordinated on behalf of the FTC the process of drafting those initial implementing rules and then supervising the FTC's program until 1981.

I am at present, a partner in the Washington, D.C. law firm of Hopkins, Sutter, Hamil and Park, and I am pleased this morning to present the statement of Irving Scher, the Chair of the Antitrust Law Section of the American Bar Association.

I am, myself, Chair of the Clayton Act Committee of the Antitrust Law Section and coordinated the preparation of this statement.

The statement is submitted on behalf of the Antitrust Section of the ABA, not the ABA itself. We plan to submit the statement to the ABA House of Delegates at the annual meeting in August, seeking the imperium of the Bar Association. For the moment, it is testimony of the Antitrust Law Section.

Briefly, Mr. Chairman, the American Bar Association has previously taken positions on issues similar to S. 996 and 994 and I have submitted to your staff copies of the February 1988 ABA position endorsing the concept of triple damages for the United States for violations of the antitrust laws and the ABA's February 1986 resolution suggesting specific changes in the nature of de minimis rules amending Section 8 of the Clayton Act.

This morning I would summarize briefly the positions in the Antitrust Section's prepared statement relating to the Hart-Scott-Rodino issues.

First of all, we oppose the provision in S. 995 that would require that the statutory size of an acquiring partner be determined by reference to the sales and assets of all of the general partners.

We are not exactly sure that that is the intention of the proposal, but if we read that intention correctly, we believe that it raises some significant problems.

We have, however, previously endorsed a possible alternative approach, which is to treat the sales and assets of the person, if any, with the largest interest in a partnership equal to or greater than 25 percent and feel that such an approach would be feasible. We would be happy to work with your staff in exploring this proposal and, if appropriate, in assisting in drafting of language.

Senator **METZENBAUM**. Your point is that just looking at the general partner alone is not enough, that there may be limited partners whose economic posture is so great that using a lower number would be more effective?

Mr. **PFUNDER**. Senator, I believe that the problem has a couple of aspects. First of all, limited partners are already taken into account under existing FTC rules to the extent that they have a 50 percent share, which admittedly is large.

The problem with counting all of the assets of all of the general partners is that it may falsely inflate the size of the resulting partnership. There may be serious difficulties persuading partners in fact to disclose to one another their revenues and assets which may be derived from entirely unrelated business ventures.

And indeed, the proposal of looking at all of the general partners raises the question of whether there might be contemplated multiple filings in order to trigger a Hart-Scott-Rodino waiting period, or periods in connection with a given acquisition by a partnership.

The concept—I think the basic difficulty arises—the partnership loophole, so called, arises from the fact that the existing FTC rules treat corporations differently from the way they treat partnerships.

If partnerships and corporations were treated identically, there would be no loophole. Conversely, if corporations were treated as you propose to treat partnerships in S. 995, shareholders' sales and assets would be examined for purposes of determining whether corporations satisfy the statutory size of person test.

And our view is simply that there may be some more modest solutions that deal adequately with the problem without implicating the sales and assets of all general partners of an acquiring partnership, which could number a great many.

The Antitrust Law Section opposes extension of the initial waiting period in cash tender offers from 15 to 20 days, but does not oppose the extension of the additional post-second request waiting period for cash tender offers from 10 to 20 days.

Senator METZENBAUM. Why would you oppose 15 to 20 days?

Mr. PFUNDER. Well, admittedly, it is not a major difference, but it will apply to every cash tender offer and the distinction, which for us makes a difference between endorsing the proposal on the extended waiting period, but not on the initial waiting period, is that one or the other of the two antitrust enforcement agencies will have initiated an investigation and will have issued a second request, thereby triggering a kind of enforcement interest in the transaction that the statute is designed to facilitate.

On the other hand, second requests are issued in something under 5 percent of all reported transactions and the extension of the waiting period——

Senator METZENBAUM. Is that true historically, or just in the last 8 years?

Mr. PFUNDER. Oh, I am taking a broad number that I have seen published somewhere historically.

The point is——

Senator METZENBAUM. Maybe that is what is wrong.

Mr. PFUNDER. I am sorry.

Senator METZENBAUM. Maybe that is what is wrong.

Mr. PFUNDER. That is possible, Senator. The point here is though that the—every cash tender offer would have a waiting period by 5 days more as a result of this proposal and while 5 days is not a lot, it can increase the price of the tender offer. It can discourage tender offers from being made. And it can impede the prospect of tender offers succeeding.

To the extent those are values that create a marketplace for corporate control, we think there is perhaps a better way of dealing with that problem and that is to lengthen the waiting period.

Senator METZENBAUM. Give me your rationale why it is bad that it might increase the price of the tender offer? What is so terrible about that?

Mr. PFUNDER. Well, the basic problem with increasing the price of the tender offer is that it is going to prevent some tender offers from occurring and to the extent that——

Senator METZENBAUM. If they made the tender offer. Now do you mean to say that those making the tender offer would sit back and say, "Gee, they have 20 days," and just conceivably during that period others might show up on the scene or whatever the case may be and we might be forced to increase our price. That is sort of a nonsequitur for me.

Mr. PFUNDER. I think it simply marginally tips the balance in favor of the target when the target has more time to muster its defenses and more time to seek alternative transaction and more time to prepare and initiate litigation.

Senator METZENBAUM. Whose ox is being gored? I am not sure whether it is the acquirer or the acquiree, or the bottom line, the shareholders of the respective companies?

Mr. PFUNDER. Well, the shareholders——

Senator METZENBAUM. That is what is bothering me in so many of these tender offers and that is, nobody gives a damn about the shareholders.

Mr. PFUNDER. Well, the shareholder obviously benefits to the extent that the cash tender offers succeed and to the extent that the price that they get for the shares that are sold as a result are increased. However, to the extent that the target is given greater odds of succeeding in defeating a tender offer, the shareholder will end up on the short end. That will vary from case to case.

What we believe is important is the process of allowing cash tender offers to proceed and in that respect I think we concur with the underlying judgment of Congress that was very much in evidence in the original distinctions made in 1976 to give cash tender offers a shorter waiting period.

Senator METZENBAUM. Please proceed.

Mr. PFUNDER. The Antitrust Section is concerned with the 25-day court authorized extension of the additional waiting period due to the complexity or scope of the information or documents received in response to second requests. Basically, we are unsure that such a long additional delay is necessary or appropriate and particularly we are concerned with the vagueness of the standard proposed in the statute.

The Antitrust Section recommends that before the jurisdictional thresholds for the HSR Act are increased, that Congress carefully consider what we believe is a basic policy issue that had arisen not deliberately, but by reason of accommodation of inflation and the fact that the jurisdictional thresholds were not initially indexed and have not been altered since the Act was passed in 1976.

As your chart graphically illustrates here, one or I think both of two things is happening. First, there is greater merger activity than there was in the late 1970s. Second, inflation has eroded the jurisdictional thresholds of the Act to make proportionally many more transactions, or put differently, transactions involving smaller parties in real terms.

Reportable, there is always a benefit in our view to raising the thresholds in a way that will reduce regulatory burdens and regulatory costs. The issue that is raised, however, is that over the years the Antitrust Division and the FTC have expressed a considerable amount of interest in relatively small transactions reportable under the Hart-Scott-Rodino Act.

And we think this is an appropriate occasion, perhaps, to consider whether the original theory underlying the Hart-Scott-Rodino, which was to apply only to the largest transactions proposed and implemented in a given year, should be reevaluated and suggest only that before the thresholds are raised that the policy issue of whether—what is today a more regulatory statute ought to be evaluated.

Senator **Metzenbaum**. Could you wind up and summarize, please.

Mr. **Pfunder**. Yes.

We have some questions related to whether the increased civil penalty authorization is necessary or appropriate. We have suggested clarification of some of the provisions relating to equitable relief obtainable in (g)(1) actions.

We do not support allowing the FTC to bring their own civil penalty actions. And the Antitrust Section specifically takes no position on the advisability of Hart-Scott-Rodino filing fees, but we do in our prepared statement offer a number of suggestions concerning that proposal and possible ways of making it work better if it is to proceed.

I appreciate the opportunity of appearing before the committee this morning and I would be happy to answer any other questions that you have.

[The statement of Mr. Pfunder follows:]

STATEMENT OF
IRVING SCHER

CHAIR
SECTION OF ANTITRUST LAW
AMERICAN BAR ASSOCIATION

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING S. 995

JULY 25, 1989

Testimony presented by
Malcolm R. Pfunder
Chair, Clayton Act Committee
Section of Antitrust Law

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as the views of the American Bar Association.

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COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW CONCERNING THE ANTITRUST PROCEDURES IMPROVEMENT ACT OF 1989

(S. 995)

These comments respond to S. 995, a bill introduced by Senators Metzenbaum and Thurmond on May 16, 1989, which would, *inter alia*, amend Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or the "Act"), codified as Section 7A of the Clayton Act, 15 U.S.C. § 18a. The bill, entitled the "Antitrust Procedures Improvement Act of 1989," would make the following changes in the Act: (a) the annual net sales or total assets of any general partner would be considered in determining the size of a partnership for purposes of the Act's size-of-person test; (b) the initial waiting period for cash tender offer notifications would be increased from fifteen to twenty days, and the additional, post-second request waiting period for such transactions would be increased from ten to twenty days; (c) it would allow the FTC or the Antitrust Division to petition a court further to extend the additional waiting period by 25 days in unusually complex transactions; (d) the statutory $10 million size-of-person test and $15 million size-of-transaction test would be increased to $15 million and $30 million respectively; (e) both equitable relief and civil penalties (increased from $10,000 to $100,000 per day) would be available, both to the FTC and the Antitrust Division; and (f) filing fees would be imposed for HSR notifications.

Proposed Amendment Relating to Partnerships

The proposed legislation states that for purposes of the HSR Act, "annual net sales and total assets of an acquiring person shall, in the case of a partnership, be based upon the annual net sales or total assets of: (1) any general partner . . . ." (emphasis supplied). As a preliminary matter, the Section has some difficulty with this language. It is unclear, first, whether the phrase "any general partner" means "each general partner." Second, does the phrase "shall be based upon" mean "shall include"? Is a partnership's size intended to include (a) the sales and assets of only one (presumably the largest) general partner, or (b) the combined sales and assets of all of the general partners? Are the sales and assets of one or more general partners to be aggregated with the sales or assets of other (e.g., limited) partners who "control" the partnership under existing FTC rules (which the bill apparently incorporate for this purpose), and with the sales and assets (if any) of the partnership itself? If one or more of the general partners happen also to be general partners in different, unrelated partnerships, are the sales and assets of those other partnerships to be included as well?

It is also unclear whether the proposed amendment seeks to alter the definition of "control" contained in the HSR rules, such that every general partner would be deemed to control a partnership (but only when it is an acquiring person), or whether the amendment is aimed exclusively at the size-of-person test, such that the assets and annual sales and revenues of each general partner would be considered only in determining the size of a partnership. It is imperative that the language of the bill clarify precisely what changes are intended.

In the event that the bill proposes to amend only the size-of-person test, the Section recommends consideration of another approach to closing the "partnership loophole," which it has previously suggested. In testimony before this Committee on February 26, 1987, Mark Crane, then Chair of the Section, proposed:

> . . . the Section suggests applying an alternative definition of control to all acquiring persons -- whether partnerships or corporations -- that do not otherwise meet the "size-of-person" test of Section 7A(a)(2) of the Act. With respect to such persons, control would be ascribed to that "owner" holding the largest interest in the acquiring person equal to or greater than 25 percent, regardless of whether such person was otherwise exempt from reporting. If two or more owners hold an equal percentage interest in the acquiring person, each would be deemed to control. If the largest holder with an interest of 25 percent or more does not meet the "size-of-person" test, or if no owner has a 25 percent interest, no filing would be required.

This approach could be adapted to change the statutory size-of-person test (rather than the test for control, to which the proposal was specifically directed) by requiring that the sales and assets of the partner with the largest percentage interest in a partnership equal to or greater than 25 percent be added to the sales and assets of the partnership (if any) in determining the partnership's size-of-person. (I.e., the size of the partnership would be determined as though the partner with the largest interest equal to or greater than 25 percent controlled it.)

The Section believes that, as drafted, S. 995 inappropriately contravenes certain fundamental principles underlying the HSR program. The regulations promulgated by the FTC to implement the Act are dependent upon a basic concept of "control." 16 C.F.R. § 801.1(b). This concept, which is critical to a determination of when and which persons must comply with the Act, attempts -- subject to considerations of administrability -- to require that only those entities having the power to direct the actions of the party are appropriately included in determining the person's size.

Existing rules, for example, do not require inclusion of assets or revenues of non-controlling entities, because such entities cannot, by themselves, direct the actions of the "person" making the acquisition. The sales and assets of such entities thus are not attributed to the person seeking to determine whether notification is required. Control is, in short, the fundamental building block of the Act, in that it provides a logical and easily applied method of identifying the "ultimate parent entity" and each of that entity's significant components.

By apparently requiring consideration of the size of all general partners in determining whether a partnership must file, the proposed legislation disregards this essential concept of control. Under the proposed legislation, a partnership would presumably have to file if one or more of its general partners (or all of them together) met the size-of-person test, regardless of whether that general partner (or those partners) control the partnership.[1] Such a requirement would trigger filings by persons that otherwise would not be required to file under the Act, based solely on the financial size of a non-controlling entity. This result would usurp the carefully planned scheme for determining which entities are significant for purposes of the Act.

Regardless of the rationale for the proposed amendment, it poses significant practical difficulties. First, in considering the assets and sales of all general partners (if that is the intention), the bill effectively inflates the sizes of all partnerships as though all the general partners had merged with one another. Whereas the present rule focuses on the worth of only controlling partners, the bill would aggregate the assets and sales of all general partners, leading to a falsely inflated size. Such a rule would tend to discourage the use of partnerships, in favor of corporations, whose shareholders' sales and assets are not similarly aggregated.

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[1] The Section submitted comments earlier this year with respect to the FTC's proposal to eliminate the "partnership loophole." See Comments in Response to Federal Trade Commission's Advance Notice of Proposed Rulemaking Relating to Hart-Scott-Rodino Premerger Notification Program, at 7-13 (copy attached). Those comments detail the reasons why a general partner should not be deemed to control a partnership.

Second, the proposed amendment conflicts with the "flow-through" rule, 16 C.F.R. § 801.11(e). Under that rule, an uncontrolled entity without a regularly prepared balance sheet excludes from the calculation of its own assets any cash that will be used to make an acquisition, as well as any previously acquired voting securities of the issuer that it is acquiring. By automatically attributing the assets of every general partner to the partnership, the bill would negate the operation of the flow-through rule. That rule is intended to avoid "double counting" the same assets toward both the size-of-person and size-of-transaction tests, thus limiting the Act's coverage to those situations where one substantial entity acquires control of another substantial entity. The bill would thwart this principle in many situations.

A third practical difficulty with requiring inclusion of the assets of every general partner in determining a partnership's size-of-person is that a partnership would have to require each general partner to disclose its unrelated assets and holdings to the partnership, and presumably to its other partners. It is far from clear that such a scenario is workable or desirable.

We are aware of the "loophole" which the proposed amendment is intended to close. Senator Metzenbaum, in a statement introducing S. 995, hypothesized a scenario whereby three large corporations form and hold equal interests in a partnership not meeting the size-of-person test, and thus are "able to avoid filing" with respect to a subsequent acquisition by the partnership. This hypothetical raises two separate issues -- relating to the formation of the partnership and to its subsequent acquisition. For a variety of legal and policy reasons, the formation of a partnership is generally not reportable under the Act, and S. 995 would not change that. The bill affects reporting obligations only of partnerships once formed.

While S. 995 would further narrow that "loophole," it would not require filing if a similar transaction were effected through a newly formed corporation that did not meet the size-of-person test. While the existing "loophole" contains some potential for abuse, S. 995 effectively reads the size-of-person test out of the Act for partnerships. The bill seems unnecessarily overinclusive and could therefore tend to discourage socially beneficial transactions that do not threaten serious harm to competition.

Longer Waiting Periods for Cash Tender Offers

The Section opposes the attempt to lengthen the initial waiting period in connection with cash tender offers, but does not oppose the proposal to lengthen the additional waiting period for such transactions from ten to twenty days.[2]

It should be recognized that altering the waiting periods for cash tender offers could have an adverse impact on the marketplace. This consideration weighed heavily in the original

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[2] The Section took a similar position in testimony before this Committee in 1987. See Statement of Mark Crane, at pp. 1-10 (copy attached).

Congressional decision to establish a shorter waiting period for cash tender offers than for all other reportable transactions. Representative Rodino stressed the dangers inherent in allowing lengthy delays in cash tender offers. See 122 Cong. Rec. H10293-10294 (daily ed. September 16, 1976). Such delays allow the target firm excessive time to implement measures to frustrate the attempted takeover. This would violate the Congressional policy to avoid favoring either the tender offeror or the target firm's management.

Moreover, while the Williams Act's waiting period has been lengthened since enactment of the HSR Act, the proposed bill would extend HSR Act waiting periods beyond present the Williams Act period in most cases in which a second request is issued. This would seem inappropriate in the absence of a demonstrated need by the antitrust enforcement agencies for additional time.

A longer waiting period allows the target firm's stock to be bid up in the market, thus making a tender offer more costly and less likely to succeed. The target firm's shareholders may thus be deprived of the very choice that cash tender offers present to them: to accept the offer and gain the tendered premium, or to reject the offer. Lengthening the waiting period for cash tender offers could produce a result that the HSR drafters explicitly sought to avoid. The Section opposes any measure that would needlessly and negatively affect the functioning of the market.

On the other hand, there is some evidence that the antitrust enforcement authorities have encountered some time constraints in analyzing at least some transactions under the present scheme. During hearings before this Committee in 1987, there was a difference of opinion among the Federal Trade Commissioners concerning the agencies' need for additional time. Commissioner Bailey, testifying for the Commission, stated: "There is no question that the Commission could have benefitted in the past with some additional time to review these transactions." See Hearings on S. 431 and S. 432 before this Subcommittee, 100th Cong., 1st Sess. (February 26, 1987), at p. 9. The majority of the Commission at that time opposed extending the initial waiting period for cash tender offers but supported lengthening the additional waiting period to twenty days. Chairman Oliver opposed any extension of cash tender offer waiting periods. Id. [3]

If the enforcement agencies genuinely require additional time, a reasonable compromise would retain the present initial waiting period for cash tender offers, but allow the same twenty days as in other transactions for review of responses to second requests and preparation of any necessary challenge.

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[3] The Section submitted comments in August 1985 opposing then-pending legislation that would have, inter alia, extended the cash tender offer waiting period to thirty days and the additional waiting period to twenty days or, where the U.S. assets or sales for the combined entities exceeded $1 billion, to sixty days. See Comments of the American Bar Association Section of Antitrust Law on H.R. 2735, A Bill to Amend Sections 7 and 7A of the Clayton Act, at pp. 9-10 (copy attached). That position was premised upon the lack of need for such extensions demonstrated by the enforcement agencies at that time.

Extended Additional Waiting Period for Complex Transactions

The Section opposes amendment of the Act to allow the FTC or the Antitrust Division to request a 25-day extension of the additional waiting period whenever, "due to the complexity or scope of the information or documentary material to be evaluated, [the investigating agency] reasonably requires such additional time . . . ." Such an amendment is unnecessary and potentially detrimental, for several reasons.

First, the language of the proposed legislation is vague and open to widely differing interpretations. It would be difficult for businesses to predict with any degree of certainty whether the extension would be granted in connection with a particular transaction. Unless the bill makes clear the standards for determining "complexity", the inability to plan a merger or acquisition in an orderly way could impede financing arrangements for many transactions. The current waiting period allows companies to plan their operations and transactions within the confines of clearly established time frames. Upsetting those well-established standards, and replacing them with an amorphous scheme, would unfairly harm those persons that comply with the Act.

Second, the Section is concerned that the vague wording of the bill would unfairly prejudice parties reporting under the Act. If no standards for complexity are enunciated, the resulting discretion would virtually ensure that the antitrust enforcement authorities could always obtain extension of the waiting period. Allowing the FTC and the Antitrust Division unfettered discretion to extend the waiting period violates the carefully balanced scheme in the current Act and rules.

Certain realities of the antitrust review process ensure that the enforcement authorities almost always have sufficient time in which to conduct their reviews. In many cases, the agency conducting the investigation has had prior experience with the relevant companies, industries or markets. Such familiarity can facilitate the review process and result in a more efficient handling of the case. This factor in effect shortens the time required by the enforcement authorities.

Further, the HSR waiting periods also do not include the time during which the parties to the transaction assemble and submit their responses to the second request. The FTC and the Antitrust Division, however, continue to investigate during this time. Only after both parties (in tender offers, only the acquiring person) have substantially complied with outstanding second requests does the additional twenty-day (or ten-day) period begin to run. The time which the FTC and the Antitrust Division historically have had in which to analyze proposed mergers is thus, as a practical matter, longer than the minimum period provided by the Act.

Where that time has not been sufficient, both agencies have a well-established practice of obtaining additional time by requesting the parties to defer consummation of their transactions, and simultaneously threatening to seek an injunction if the parties do not voluntarily agree. Although the parties are not required to accommodate such requests, they normally do so.

Finally, the section emphasizes that the current scheme is both workable and unproblematic. Undoubtedly, many of the transactions that have been scrutinized over the decade in which HSR has been in effect would be classified as "complex," however that elusive term ultimately might be construed. Yet the FTC and the Antitrust Division have normally been able to complete their analyses in the prescribed time frame. There is therefore no reason to alter the status quo for "complex" transactions, especially since doing so could impose heavy costs upon shareholders, consumers and corporations, with no countervailing benefits.

Increases in Size-of-Person and Size-of-Transaction Thresholds

S. 995 would change both the size-of-person test in § 7A(a)(2) and the size-of-transaction test in § 7A(a)(3), neither of which have been altered since the Act was adopted in 1976. The Act currently provides that, in order to be required to file notification, one party to a transaction must have at least $10 million in annual net sales or total assets, and another party must have at least $100 million in sales or assets. The proposed bill would raise the size-of-person test for the smaller party from $10 million to $15 million (leaving the $100 million test unchanged). Similarly, HSR notification is not currently required unless, as a result of the acquisition, the acquiring person would hold 15 percent or more of the voting securities or assets of the acquired person, or $15 million worth of assets or voting securities of the acquired person (or both).[4] The bill would raise this threshold to $30 million, but would not affect the 15 percent test.

The failure to index or amend the statutory filing thresholds has resulted in a gradual but dramatic expansion of the coverage of the HSR Act over the nearly 13 years since its enactment. Inflation during that period has reduced the value of the dollar by more than one-half, thus reducing the HSR thresholds, in real terms, by comparable amounts. The result is that today many more persons satisfy the size-of-person test, and many more transactions satisfy the size-of-transaction test, contained in the Act. The HSR Act has thus been transformed into a much more comprehensive regulatory scheme than in 1976.

The Antitrust Section believes that this transformation raises a significant policy issue, the resolution of which should determine whether raising the HSR statutory thresholds is desirable. If Congress believes it appropriate to reduce the scope of the Act, in order more closely to approximate that originally intended, then raising the thresholds is an appropriate method of implementing that goal. The resulting reduction in regulatory burden and cost is, in itself, desirable. Moreover, the enforcement agencies should be focusing their scarce resources on the greatest threats to competition, which arguably are posed by larger transactions. If, on the other hand,

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[4] This provision is modified by 16 C.F.R. § 802.20, which effectively changes the size-of-transaction test to require notification only for transactions in which the acquiring person will hold $15 million of stock or assets, or 50 percent of the voting securities of an issuer having either annual net sales or total assets are $25 million or more. See note 13 below.

Congress believes it wiser to retain the current, broader scope of the Act, then raising the thresholds may be undesirable.

A key factual question relevant to this policy issue is the extent to which smaller acquisitions and/or acquisitions involving smaller parties raise antitrust issues warranting enforcement agency review. Congress may wish to seek and evaluate data relevant to this issue from the enforcement agencies and other interested parties.

Limited information is available from statistics previously published by the FTC. For example, in fiscal year 1985 -- the most recent year for which data is publicly available -- the FTC and the Antitrust Division together issued second requests in 5.9 percent of the filed transactions. Second requests were issued in only 2.6 percent of the transactions where the size of the transaction was between $15 and $25 million, but 7.0 percent of those where the size of transaction was $25 to $50 million.[5] Thus the agencies investigated a slightly higher proportion of the $25-$50 million transactions (and considerably fewer of those in the $15-25 million range) than average for that year. Yet 43.6 percent of all second requests issued in 1985 were for acquisitions valued below $50 million.[6]

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[5] Tenth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (hereinafter "HSR Annual Report"), Exhibit A, Table IV.

[6] Id. at Table II Publicly available figures do not permit a similar analysis of second requests relating to transactions valued above and below the proposed $30 million threshold.

In the same year, smaller than average percentages of transactions involving acquired entities with assets or sales of less than $50 million resulted in second requests, but proportionately more than twice as many second requests were issued where the acquiring person had assets of less than $15 million. [7]

In fiscal year 1984, 42.2 percent of all second requests related to transactions valued at less than $50 million, although fewer than average numbers of requests were issued for all transactions valued below $50 million. [8] In the same year, a substantially larger than average percentage of acquiring persons with assets between $15 and $25 million received second requests, although the same was not true of acquired entities with assets under $50 million. [9]

In fiscal year 1983, a greater than average number of requests were issued for transactions valued between $15 and $25 million and for those valued between $25 and $50 million, and 64.7% of all such requests were issued with respect to transactions valued below $50 million. [10] Greater than average percentages of second requests were received in that year by acquired entities with assets between $15 and $25 million and by acquired entities with sales between $25 and $50 million, although not by acquiring persons with either sales or assets of less than $50 million. [11]

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[7] Id. at Tables VII and VIII.

[8] Ninth HSR Annual Report, Exhibit A, Table IV.

[9] Id. at Tables VI, VIII and IX.

[10] Eighth HSR Annual Report, Exhibit A, Table IV.

These statistics present a mixed picture and in any case are not particularly current. They suggest the possibility, however, that a legislative proposal to reduce the number of HSR filings may have the unintended consequence of eliminating HSR notifications for a category of transactions that have in some years received a disproportinately large number of second requests from the antitrust agencies. [12] And it is quite clear that the proposals in S. 995 would eliminate notification obligations with respect to a significant number of transactions which the enforcement agencies have routinely investigated. We therefore suggest that Congress should carefully evaluate the policy considerations and the impact on antitrust law enforcement efforts inherent in raising the HSR thresholds, before deciding to do so.[13]

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[11] Id. at Tables VI, VII, VIII, and IX.

[12] In 1985 the FTC declined to implement a previously proposed rule that would have raised the size-of-transaction test from $16 million to $25 million, on the basis of its experience in 1982 and 1983 that small transactions that would have been made nonreportable gave rise to "enforcement interest." Compare 47 Fed. Reg. 29182, 29198 (July 2, 1982), with 50 Fed. Reg. 38742, 38743 (September 24, 1985).

Increased Civil Penalties and Equitable Relief

Section 7A(g)(1) of the HSR Act imposes a maximum civil penalty of $10,000 for each day that a person is in violation of the Act. That section is generally recognized as the appropriate basis for obtaining sanctions against violations that have already occurred, whereas § 7A(g)(2) is aimed at requiring compliance where it may still be obtained. The proposed bill would increase the civil penalty maximum in § 7A(g)(1) to $100,000 per day. The bill would also amend the same section to subject violators to "such equitable relief as the court finds appropriate."

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[13] The impact of the proposed increase in the size-of-person threshold will be significantly affected by whether the FTC makes corresponding changes in rule 802.20, the minimum dollar value exemption. If the minimum dollar value rule is not amended, HSR notification will be required in all cases where a person is acquiring 15 percent or more of the acquired person's assets or an acquired entity's voting securities and those assets or voting securities are valued at $15 million or more. If § 802.20 is amended to increase the minimum dollar value from $15 to $30 million, (1) all asset acquisitions valued at $30 million or less would be exempt; (2) all acquisitions resulting in holdings of less than 50% of the issuer's voting securities would be exempt if valued at $30 million or less; and (3) all acquisitions resulting in holdings of voting securities valued at $30 million or less (regardless of the percentage held) would be exempt, as long as the issuer has annual net sales and total assets of less than $25 million. (Of course, the FTC could also raise that $25 million threshold in § 802.20(b) if it revises the minimum dollar value rule.)

We agree with remarks attributed to several FTC Commissioners that a maximum penalty for HSR violations of $10,000 per day amounts to little more than a "tax" or a "licensing fee" in large, hostile takeover fights, where huge financial gains can be realized by not filing HSR notification. Evading the Act in these circumstances allows the purchase of stock without a waiting period -- giving the purchaser a head start over those who file and observe a waiting period -- and without first notifying the target of its intentions. Stock can thus be acquired at bargain prices, with no disclosure to the target or the public until the purchaser is required to file Schedule 13D with the Securities and Exchange Commission, ten days after accumulating a five percent holding. Thus, raising the maximum allowable penalty gives the agencies and the courts potentially greater flexibility in dealing with HSR violations.

Notwithstanding these considerations, we question whether such substantial escalation of potential civil penalty exposure is either necessary or appropriate for violations that are not willful. Voluntary compliance with the Act has been exemplary over the years since it was passed. Filing notification is not particularly burdensome or expensive and does not generally delay most transactions significantly. The Act and the FTC's existing rules seem to have provided adequate deterrence against most violations. The FTC retains broad rulemaking powers to clarify and interpret the Act where necessary to its antitrust enforcement functions. Only a handful of civil penalty or compliance actions have been filed.

The HSR program seems to be working extremely well, and evidence of avoidance or evasion is sporadic and anecdotal. Under these circumstances it is simply unclear whether the threat of massive civil penalties will significantly enhance the effectiveness of the program. Additional deterrence would be useful (and justified) only if it clear what activities are intended to be deterred.

The threat of huge penalties (often accrued over several months and sometimes even years before a violation is discovered or detected) would surely give the agencies greater leverage in negotiating compliance disputes and settlements of threatened or filed civil penalty actions. However, it is not clear that such an increase is generally necessary or appropriate, as no HSR civil penalty action has ever been litigated to judgment. The Committee may wish to invite testimony from the agencies and from parties against whom civil penalty suits were filed or threatened, concerning the necessity or advisability of enhancing the agencies' negotiating posture in such situations.

The Committee may wish also to consider the possible impact on the FTC's Premerger Notification Office of increasing the maximum civil penalty tenfold. That office might receive many unnecessary filings, as parties file notification in order to avoid even a remote possibility of huge liability under the Act. Moreover, the FTC staff -- which is already stretched very thin -- can probably expect a significant increase in requests for interpretations of the Act and rules.

We are uncertain of the sponsors' intentions in amending § 7A(g)(1) to allow grants of equitable relief. If the intent is to permit a court to order disgorgement of profits gained from acquisitions made without complying with the Act, we suggest that the bill should explicitly so provide. Otherwise, there is an argument that disgorgement is not an available remedy, as the Senate Judiciary Committee reported a bill in 1976 that contained such a remedy, but that provision was eliminated from the version later passed by the Senate. Similarly, if the Committee believes that the $10,000 (or proposed $100,000) limit in § 7A(g)(1) should not apply to equitable remedies such as disgorgement, the language of the bill should be so clarified. Indeed, if equitable relief were to include disgorgement, there may be little reason to raise the maximum daily penalty.

In addition, if the Committee intends to permit courts to rescind transactions that result in violations of the Act, the bill should provide for rescission explicitly, and the practical implications of such a power should be carefully assessed.

We believe that in assessing civil penalties under § 7A(g)(1), courts will likely take into account the same kinds of factors considered in assessing civil penalties under other statutes, such as the willfulness of the violation, the amount of any gains resulting from the violation, and the clarity of the statutory and regulatory provisions that were violated.

(Indeed, where such provisions are not reasonably clear, and particularly where the agencies seek to enforce interpretations of the Act and rules that are not well publicized and widely understood, Congress cannot hope to accomplish greater compliance merely by increasing the maximum civil penalty.) The Committee might wish to enumerate in the bill and explain in its legislative history any specific factors or considerations that courts should take into account in assessing civil penalties for HSR violations. For example, the Committee might specify a higher maximum civil penalty for willful violations than for an inadvertent failure to file, so that courts do not necessarily assume a Congressional intent to punish all violations equally severely.

FTC Authority to File Suits Seeking Civil Penalties

We understand that, with the exception of presently pending cases and one in the late 1970's, the Department of Justice has prosecuted every HSR civil penalty complaint requested by the FTC. Moreover, every case pursued by the Department (again, excluding pending cases) has resulted in a consent settlement, entered into after consultation with the FTC. Because we see no compelling need to change the current system under which the FTC must request the Department to file civil penalty actions under § 7A(g)(1), particularly if the FTC has the same power as the Justice Department to seek equitable relief, the Section does not support this proposal.

HSR Filing Fees

S. 995 contains a proposal (new § 7B of the Clayton Act) to require payment of Hart-Scott-Rodino filing fees by acquiring persons as a condition of filing the notification required by 15 U.S.C. § 18a. The fee is specified as one-fiftieth of one percent of "the value of the transaction involved in such merger," [14] up to a maximum of $50,000. The FTC would be authorized (with the concurrence of the Assistant Attorney General for Antitrust) to establish rules "for transactions in which the precise value is not known." Resulting collections would be divided equally between the FTC and the Antitrust Division for use in "the enforcement of the antitrust laws."

The Antitrust Section takes no position on the advisability of requiring Hart-Scott-Rodino filing fees. Nor does the Section take a position on whether it is appropriate for such fees to be remitted to the U.S. Treasury, or divided between the antitrust enforcement agencies, as the bill proposes. Those proposals raise broader political issues concerning whether the costs of government regulation should be borne by those whose activities are regulated, and whether fees collected by the agencies should bypass traditional Administration budgeting and Congressional appropriation processes.

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[14] The phrase "involved in such merger" is superfluous and potentially confusing and should be deleted from the bill.

We are not aware of any federal agency which collects and retains filing fees, rather than remitting them to the Treasury. We are aware of controversy surrounding a pending proposal for the SEC to do so (see National Law Journal, May 1 1989, at p. 1). The Antitrust Section approves of the apparent intention underlying S. 995 to provide additional funding to the two enforcement agencies. It would be unfortunate, however, if Congress were to adopt this proposal but reduce subsequent appropriations to the agencies by the amounts of fees collected.

Implicit in the S. 995 proposal is the suggestion that the FTC (rather than the Antitrust Division) would administer the HSR filing fee program.[15] Regardless of which agency administers the program, it is important to take into account the additional costs which this proposal would impose.

First, the agency must provide staff to collect, account for and transmit the fees, whether to the Treasury or one-half to the other enforcement agency. Second, the collecting agency must provide staff to verify the tendered amounts, to consult with filing parties concerning their determination of transaction values and computation of resulting fees, to enforce the filing fee requirements where the fees initially tendered and accepted are determined to be incorrect, and in some fashion to adjudicate disputes with or among filing parties. These costs are far from trivial, and Congress should appropriate sufficient funds to defray them. If the two enforcement agencies are to divide collections equally, we suggest that the division occur after administrative costs are deducted. Such a division could also recognize the costs currently borne by the FTC in administering the HSR program.

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[15] We suggest that the bill at least make explicit that the fees are payable to only one agency at the time of an HSR filing, not both.

The Section also believes that imposition of filing fees will create at least a marginal additional incentive for parties to avoid HSR filings. This is not a reason to oppose filing fees, but the potential additional costs of enforcement should not be ignored.

We suggest also that S. 995 incorporate a broader delegation of rulemaking authority than it presently contains. The bill recognizes that rules must be promulgated to determine the amount of the fee "for transactions in which the precise value is not known." However, the administrative questions raised by a filing fee proposal are far broader.

For example, 16 C.F.R. § 801.10 defines "the value of voting securities and assets to be acquired" in terms of "market price" (for securities only), "acquisition price," and "fair market value." Section 801.10(c)(2) specifies that the acquisition price "shall include the value of all consideration for such voting securities or assets to be acquired" and generally comes into play when the acquiring person assumes or repays outstanding obligations of the acquired person. Section 801.10(c)(3) requires the board of directors of the acquiring person's ultimate parent entity (or its designee) to make a good faith determination of fair market value as of a specific date within 60 days prior to the filing or consummation, whichever is applicable.

Such determinations need not be formalized or documented under current rules; their only function is to determine whether a filing is required. Under S. 995 this determination would presumably be relevant to calculation of the filing fee, and new rules will be required for documenting that determination. In addition, rules will probably be required to clarify situations in which a person is both an acquiring and an acquired person, and those in which multiple "acquisitions" are reported in a single filing.

These difficulties are not insurmountable, and existing language in 15 U.S.C. § 18a(d)(2)(C) provides a basis for resolving them. It might be preferable, however, to make clear that Congress envisions a rulemaking proceeding specifically implementing filing fee procedures before they become effective.

Finally, we offer some observations on the proposed formula for determining the amount of the required fee. Some presently reportable transactions would generate very small fees. For example, an acquisition of control of a company with annual net sales or total assets in excess of $25 million but with marginal net worth may be effected for a nominal acquisition price. A filing would nevertheless be required if the size of person tests are met. In this case the filing fee might be literally only a few dollars. It might be advantageous to allow the FTC to consider, through rulemaking, imposition of a minimum fee and/or waiver of all fees below a certain minimum.

On the other hand, acquisitions exceeding the current $15 million threshold would incur a minimum $3000 filing fee, which may well exceed the legal fees required to prepare the HSR filing. (Under S. 995, the threshold would be raised to $30 million, and the minimum fee for such transactions would rise to $6000, assuming that the FTC makes comparable changes in 16 C.F.R. § 802.20, its minimum dollar value exemption.)

Overall, we believe the proposed fee formula is appropriate. Consideration might be given to some reduction of the fee schedule at the low end. At the high end, the proposed statutory maximum of $50,000 applies to transactions valued at or above $250 million. Thus an acquisition valued at $250 million would require the same fee as one valued at several billion dollars.

Attachment 1
(see footnote 1)
of text

COMMENTS OF AMERICAN BAR ASSOCIATION'S SECTION OF ANTITRUST LAW IN RESPONSE TO FEDERAL TRADE COMMISSION'S ADVANCE NOTICE OF PROPOSED RULEMAKING RELATING TO HART-SCOTT-RODINO PREMERGER NOTIFICATION PROGRAM

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

I. Introduction

The Federal Trade Commission on February 24, 1989, issued an advance notice of proposed rulemaking ("ANPR") in which it requested comments on five generally-phased "options" for expanding the scope of the rules (16 C.F.R. Parts 801-803) implementing the Hart-Scott-Rodino premerger notification program under Section 7A of the Clayton Act, 15 U.S.C. § 18a ("HSR," "HSR Act" or the "Act"). 54 Fed. Reg. 7960-7964 (February 24, 1989).

The ANPR is stated to be --

> directed principally toward reducing the number of non-reportable transactions that may raise antitrust concerns and reducing the availability of devices for avoiding reporting and waiting requirements. 54 Fed. Reg. at 7960.

The ANPR proposes five general types of rules changes. The first would modify the current so-called "flow-through" rule, which allows a newly formed entity to exclude from its "size of person" funds borrowed for purposes of making an acquisition. The second option contemplates defining each general partner or managing partner as controlling a partnership. Option Three would reduce the present 50% ownership level which defines control of a partnership; this proposal might also be extended to corporations. The fourth option would expand the definition of "entity" (and therefore the statutory definition of "person") to include a "group" as that term is recognized by the Securities and Exchange Commission. The final option is to enact an "acquisition vehicle rule" which the Commission proposed for comments in 1985 but never promulgated.

These comments are submitted by the Antitrust Law Section of the American Bar Association in response to the ANPR. They were prepared by Helene Jaffe, Bruce Prager and Malcolm Pfunder and approved by the Antitrust Section Council on April 5, 1989.

Purpose and Scope of the ANPR

The Antitrust Section is concerned over the apparent purpose and scope of the options under consideration. The proposed options and underlying reasons for seeking revisions at all are framed so generally that it is difficult to determine (and therefore to comment upon) what the Commission contemplates.

The only explanation in the ANPR of why the Commission believes changes are needed is as follows:

> Based on the Commission's experience with the new partnership control rules in effect for 18 months, we believe that there may continue to be acquisitions that may not be covered by the HSR premerger reporting requirements that it would be useful for the enforcement agencies to have an opportunity to review. [54 Fed. Reg. at 7962]

The Commission's "experience" with the partnership control rules is not detailed in the ANPR. The Commission provides no information or data explaining the basis for its "belief." It does not describe the transactions which it says would be "useful" to review or indicate whether such transactions are believed to raise significant antitrust concerns.

While reliable data are not available, the Antitrust Section does not believe, and the ANPR does not establish, that significant acquisitions raising genuine antitrust issues are routinely being consummated without being reported under the Act. Nor does the Section believe that further narrowing of the "partnership loophole," or further expansion of the definitions of "control" or "entity," or modification of the "flow-through" rule are either necessary or appropriate to prevent the consummation of transactions without reporting.

We respectfully suggest that the Commission more thoroughly define the "problems" it believes exist in order to provide an appropriate backdrop against which to consider the need for the kinds of "solutions" that it is apparently considering.

The Concept of Avoidance

Implicit in the ANPR is a concern that significant transactions are being deliberately structured to "avoid reporting" and that the HSR rules should be changed to prevent such avoidance. All other factors being equal, parties to mergers and acquisitions are likely, if circumstances allow, to structure transactions so that no notifications, waiting periods or approvals will be required, thus saving legal fees, time, and inconvenience. Conversely, there is seldom a reason deliberately to structure a transaction to bring it within the HSR Act, if such compliance is not otherwise required.

Parties contemplating a transaction determine whether a given structure or form is reportable by examining the HSR rules. All things being equal, if the rules say, for example, that a particular acquisition is reportable when made by a corporation, but not when made by a partnership, the parties are very likely to have a preference for a partnership format. If situations such as these are among those that cause the Commission concern, then there is a ready explanation for many examples of such "avoidance." The explanation is simply that the rules specify different treatment under HSR for differently structured transactions that have the same (or very similar) results for the parties from a financial and other points of view. In such cases, the Antitrust Section does not believe it appropriate for the Commission to approve or condemn the parties' choice of transaction structure based on whether or not it has been selected in some part because it does not require notification. Determining whether a transaction is reportable should normally be a relatively mechanical process, to which the concept of "avoidance" adds little or nothing.

If the Commission identifies certain commonly used transaction formats that it believes routinely warrant antitrust review, the simple solution is to change the HSR rules to require notification, based on a finding that the change is "necessary and appropriate."

But in this ANPR the Commission appears to be concerned that parties to some large acquisitions have deliberately chosen otherwise appropriate structures for their transactions, at least in part, so that a straightforward application of the rules makes them non-reportable. However nothing in the ANPR suggests a Commission determination, or even the basis for a Commission belief that such transactions routinely, or even occasionally, raise substantive antitrust issues. Nor does anything in the ANPR lead to the conclusion that the rules changes suggested in the five "options" are either "necessary" or "appropriate" to carry out the purposes of the HSR Act.

The ANPR does not explicitly provide that any of the five proposed options are aimed at "avoidance" in the § 801.90 sense. Rather, on their face, the options appear simply to reflect possible rules changes that would draw lines between reportable and non-reportable transactions differently from where they have previously been drawn. However, the ANPR does not purport to justify these changes as either necessary or appropriate to reduce the number of non-reportable transactions that may violate the antitrust laws. The Antitrust Section will attempt to respond to the Commission's questions on each of the options, based on our own beliefs as to whether these options are necessary or appropriate to carry out the purposes of the HSR Act.

General Effect of the Proposed Options

The Antitrust Section believes that the general effect of the proposed options would be dramatically to increase the number of filings which the enforcement agencies must review. However, because all the proposed options involve changes in procedural reporting requirements that bear no necessary relation to the competitive impact of the underlying acquisitions, the overwhelming majority of the additional filings will be unnecessary to effective antitrust enforcement.

Since the Act became effective in late 1978, there has been a significant increase in the number of transactions requiring notification. Some portion of this increase is likely attributable to increased merger activity. A much larger portion of the increase, we believe, is attributable to the effect of inflation on the size-of-person and size-of-transaction tests. Based on the CPI index, one 1986 U.S. dollar was worth $1.93 in 1976, when the HSR Act was passed. Thus, in 1986, the $100 million size-of-person test was only $51.8 million in constant dollars, and the $15 million size-of-transaction test was only $7.8 million.

While the Commission has promulgated a number of specific rules changes over the years that have tended, coincidentally, to reduce the number of notifications required by the Act, the Commission has not comprehensively and systematically attempted to reassess whether the HSR reporting requirements reflect the original intent of Congress to review only a relatively small number of the largest transactions.

The present ANPR appears to reflect a general Commission reluctance to allow large dollar value acquisitions to escape notification. So long as some transactions of a given type may raise substantive antitrust concerns, the Commission seems determined to require notifications on all of them. The result increasingly resembles a comprehensive regulatory review process through which all acquisitions must pass.

Congress has implicitly acquiesced, and sometimes actively encouraged, this development. There has been little or no pressure from Congress to narrow the HSR program. Indeed, recent Commission proposals for a no-strings exemption for acquisitions of up to 10% of the outstanding voting securities of an issuer, which was endorsed by this Section, has encountered surprising opposition in the face of statistics demonstrating that the agencies have taken no enforcement action whatsoever against such acquisitions. But in an era of ever-tighter agency budgets, we do not believe that an increasingly regulatory approach to premerger notification represents the most efficient use of increasingly scarce enforcement resources.

We therefore urge the Commission to reassess the proposals in the ANPR from the original perspective of the HSR Act. The Antitrust Section does not believe that the appropriate test for these proposals should be whether "it would be useful for the enforcement agencies to have an opportunity to review" additional transactions. This approach ignores the increased cost of agency review of the large number of additional notifications that would be required. It ignores the additional burden of compliance that would fall upon the parties to these transactions. It also ignores the increased cost of having to supply the additional information which the Notification and Report Form would have to be expanded to require in order to allow meaningful review. Finally, it ignores the additional resources which the agencies and the parties would doubtless have to expend on informal and formal requests for clarification or additional information, in order to analyze all of the possible relationships and competitive effects which these expanded filings could potentially disclose.

We respectfully suggest that the Commission and the Antitrust Division cannot afford to require notification for the sake of notification. The options proposed in the ANPR should be subjected to a cost-benefit analysis that recognizes the costs to the agencies and to the economy of large numbers of unnecessary filings. The Commission must develop a comprehensive approach to the HSR Act that recognizes that some kinds of transactions are more likely than others to violate the antitrust laws and that it is neither efficient nor necessary to require reporting of all transactions that may possibly violate the antitrust laws.

Option One

We oppose elimination of the "flow-through" rule of §801.11(e) which was enacted in 1987. In November of 1985 this Section commented in favor of the Commission's proposal to formalize the "flow-through" rule (which had been the Commission's informal position for many years previous) and we have seen no developments that warrant a reversal of our support for the rule. (A copy of the portion of our earlier comment addressing this issue is attached hereto as Annex 1 and is incorporated herein by reference.)

Elimination of the "flow-through" rule would result in double counting of assets and would effectively eliminate the distinction between the size-of-transaction test ($15 million) and the preacquisition size-of-parties test ($10 million) in many acquisitions. It would also encourage parties to structure financing of acquisitions in such a way that the funds to be used as consideration would never be an asset of the acquisition vehicle. The method of financing should generally not be an issue of antitrust concern and therefore every effort should be made not to allow HSR to influence that aspect of acquisition structuring.

Further, at least as the Notification and Report Form is presently constituted, a filing on behalf of the acquisition vehicle (which is all that elimination of the "flow-through" rule would generate) would provide very little information of direct help to the antitrust enforcement agencies in gauging the competitive consequences of the transaction. In fact, the only useful information that would be elicited is the name, address and percentage interest held by any 5 percent or greater shareholder in the acquisition vehicle. The Form will not, however, reveal significant non-voting-security holders or partners of the entity. Moreover, those entities which are able to take advantage of the "flow-through" rule do not appear likely to raise antitrust concerns because of their lack of operating businesses. See Statement of Basis and Purpose, 52 Fed. Reg. at 7070.[1] The intent of enacting rule §801.11(e) remains valid and, therefore, the rule should not repealed.

Options Two and Three

Two of the Commission's proposals directly address the definition of control. First, the Commission proposes to treat general partners and managing partners as "control" persons. Second, it proposes to reduce the percentage interest at which control will be presumed to a level below 50 percent.

In analyzing the utility of these approaches it is useful to start by considering what the concept of "control" is intended to achieve. The HSR Act provides for prior notice of acquisition transactions to the federal government agencies to allow them to consider whether a transaction raises any antitrust concerns requiring further review. Thus, it can certainly be argued that a primary objective of the control test should be to identify those entities that are likely to have both the ability to effect anticompetitive conduct and an incentive to do so. This requirement might in other contexts be referred to as "motive and opportunity." Concluding that in all instances an entity having only one of these characteristics controls could dramatically increase the number of required filings but not serve the purpose of the Act.

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[1] "Statement of Basis and Purposes" is abbreviated hereinafter as "S.B.P."

Determining that the power to influence constitutes control without requiring that there be any financial incentive to exercise that power to achieve anticompetitive results might lead to the conclusion that every mutual fund manager, trustee, corporate chief executive or other entity capable of directing policy controls. *See* S.B.P., 43 Fed. Reg. at 33457-33458. By contrast, concluding that a significant financial interest by itself (even without an equity interest) is enough to presume control could result in concluding that debt holders control, even though under most circumstances their ability to direct policy is limited. *See* S.B.P., 43 Fed. Reg. at 33457-33458. The Commission has recognized that an insignificant financial interest and a lack of ability to effectively control is rarely, if ever, going to raise antitrust concerns. *See generally* S.B.P., 53 Fed. Reg. at 36838.

It is consistent with this analysis to conclude that there may be some level of financial interest at which the ability significantly to influence business policy of the entity should be presumed. *See* S.B.P., 43 Fed. Reg. at 33457 (the Commission concluded that a fifty percent shareholder will always be able "to direct the day-to-day activities of the controlled entity" while *de facto* control may exist with a lower level of interest); S.B.P., 52 Fed. Reg. at 20061 ("attribution of control to persons owning such large economic interests [in entities which do not issue voting securities] is appropriate, because, as a general rule, they control these entities in the common sense of that word"). Although it is not as clear, one could also conclude that an entity with a great deal of power to influence (depending upon how it is conferred) may have some incentives to act anticompetitively even with little (or no) ownership interest. These presumptions are implicit in the present rules.

Because the controlling person is required to comply with the HSR Act's filing requirements, another factor to be considered is whether the entity deemed to control will have the power to require the controlled entity to supply the information necessary to prepare the Notification and Report Form. It does little to further antitrust enforcement goals if control persons will frequently be unable to supply the necessary information. This issue was addressed when the Commission adopted the contractual ability standard of control. See 16 C.F.R. § 801.1(b)(2); S.B.P., 43 Fed. Reg. at 33458 ("When such a contract exists, the controlling entity can direct the actions of the controlled entity and can presumably supply the data required by the Notification and Report Form without difficulty").

In addition, for the control test to work adequately, those deemed to control should be entities who will generally support the objectives of the controlled entity so that the control person will supply the information needed for the controlled entity to prepare a Notification and Report Form. Otherwise the control person could thwart transactions by refusing to allow the controlled entity to file. Further, for the notification process to meet its objectives, the person required to file must be required to supply useful competitive information. For example, as is discussed in the context of Option One, a filing from an acquisition "shell" with minimal assets, no financial statements and no revenues is of little value to the antitrust agencies. A final, previously stated objective of the Commission in defining "control" is establishment of "easily administrable criterion" under which all "parties should be able to determine their obligations . . . with reasonable certainty based on objective criteria." S.B.P., 43 Fed. Reg. at 33457, 33458.

With these factors in mind we can consider the current control tests. With respect to partnerships (and other entities that do not have voting securities) the control test looks only to financial interests without any explicit consideration of the ability to direct or influence anticompetitive conduct. See 16 C.F.R. § 801.1(b)(1)(ii). Thus, a limited partner with a 50 percent or greater financial interest is deemed to control even though under state law a limited partner is generally prohibited from participating in the management or operation of the partnership. See Uniform Limited Partnership Act, § 303 (1976). By contrast, for corporations (and other entities with voting securities or boards of directors) control is defined based solely on presumed ability to direct or influence policy, taking into account beneficial ownership of voting securities and the contractual right to appoint directors, but not specifically considering financial (equity) interest. See 16 C.F.R. §§ 801.1(b)(1)(i), 801.1(b)(2).

The current Rules seem generally to generate filings with a significant amount of useful competitive information and are easily administrable. Those persons whom the current rules define as having control have been willing to make filings on behalf of their controlled entities when required and control persons have in fact been able to get access to required information from entities they are deemed to control. Finally, the existing control tests generally have been easy to apply, allowing parties to act with reasonable certainty.

Even if we were to presume the desirability of capturing some transactions that are presently not subject to reporting, and seek to do so by redefining control, the overriding issue should be to preserve as many of the benefits as possible of the present system in terms of clarity and simplicity of application, value of information supplied and assurance that the required parties are able to file. Another requirement should be equality of treatment among varying structures to avoid repeating the present situation wherein some forms of transaction are preferred for their ability to escape the filing requirements. As is discussed in our introductory remarks, as long as essentially identical (or at least similar) transactions are treated differently under the Act, incentives to choose a structure to avoid filing will remain.

The standards for inferring control should only be lowered if the new tests are able to satisfy most of these objectives. Against this standard, assuming that all general partners control a partnership, without regard to their level of financial interest, is unrealistic. Although it seems clear that a sole general partner has such a high level of influence that control exists (even if that general partner's direct ownership interest is small), where a general partner is one of many, control should only be presumed where a 50 percent financial interest is held.

The proposal that any "managing partner" be deemed to control meets even fewer of the outlined criteria. Its most glaring flaw is that it is a very imprecise term that does not necessarily imply any established level of influence or of financial interest. Even if the position "managing partner" were defined broadly and clearly in an accompanying rule (no small feat in and of itself), the concept doubtless would require an analysis of the partnership agreement to determine what powers were delegated to the "managing partner," without regard to the title. Any other approach would merely result in expunging the phrase "managing partner" from the lexicon of corporate lawyers. Furthermore, under partnership law a delegation of authority to a managing partner will not confer the exclusive right to control on matters significantly effecting the partnership, such as an acquisition, absent an explicit and unambiguous agreement. 2 Bromberg & Ribstein on Partnerships, § 603 at 6.41 (1988). Even then it is questionable whether the other general partners can be excluded from the decision making process. For these reasons this concept should be abandoned.

The proposal that the general percentage threshold for control (whether through financial interest in a partnership or holding of voting securities of a corporation) be reduced also has numerous flaws. One of the most troubling issues raised by this option (as well as by option four, infra) is that multiple filings would be required on many more transactions than is currently the case. This would result not only in increased costs of compliance and additional delay in assembling the material necessary to start the multiple waiting periods, but would also enable holders of a minority interest to have an effective veto power over transactions despite support of the majority in interest. The Commission gives no indication in the ANPR of how it would deal with the notice, filing and waiting period issues that would arise if an acquiring entity with multiple ultimate parent entities were to acquire an issuer (or assets) from another entity with multiple ultimate parent entities. When would the waiting period begin and end? Who would give notice to whom? Would the transaction be thwarted if one parent on one side refused to file?

While the present rules establish some situations in which more than one party will be required to file (e.g. 50/50 owned corporations), such situations are the exception rather than the norm. If the Commission concludes that it is essential to have reporting in cases where there is no 50 percent owner, a position that we are not presently prepared to endorse, the Section believes that only the largest interest holder should be required to file. We do not believe that all interest holders over a certain percentage less than 50 percent should be required to file in any circumstance.

If, however, the Commission determines that some threshold of control at a level of ownership interest below 50 percent is necessary, the Section urges that the Commission adopt a test that establishes that only the holder(s) of the largest interest equal to or greater then 25 percent as control the entity. (This is the position suggested by this Section in November 1985 as an alternative to the proposed acquisition vehicle rule. See Annex 1.) Even though a 25 percent control test raises the possibility that there could be as many as four ultimate parents under each measure of control, because only the one or more persons with the largest percentage share would control, instances where there actually would be multiple ultimate parent entities would be far fewer than under a straight percentage control test at the same level. The size-of-person test and size-of-transaction test, as well as any resulting reporting requirement, would then apply to each control person in the same way as under the present rules.

In light of what the Section perceives to be the goals that the Commission seeks to address by its proposals in the ANPR, we believe that the Commission should further address ways to make the treatment of corporations and partnerships more uniform, particularly with regard to how each may be controlled under the Rules. In this regard we suggest that the Commission focus on the differences in treatment, some of which were mentioned above, and seek ways to either limit or expand the existing definitions to make them the same. This could include, for example, (1) expanding the definition of control to provide that a corporation would be controlled by any shareholder who holds 50 percent or more of the total shareholder's equity, without regard to whether the shareholder holds voting securities or not; or (2) changing the definition of control for partnerships to provide that a partner having the right to cast 50 percent or more of the "votes" on issues of governance of the partnership, as determined by the terms of the partnership agreement, would control (either in place of or in addition to the present test for a partnership). Whether it is achieved by expanding the existing definition of control or by adopting different definitions, the tests of control applied to partnerships and to corporations should be substantially the same. (Although not specifically the subject of this ANPR, the Section believes that the Commission should reevaluate differences in the treatment of partnerships and corporations under other provisions of the Rules, including, among others, formation of joint ventures, intraperson exemptions and acquisitions of partnership interests, to determine whether more uniform treatment is practicable.)

Option Four

Option Four proposes that the term "group" be returned to the definition of "entity" in Section 801.1(a)(2) and that it be defined in accordance with the Securities and Exchange Commission ("SEC") definition. The Antitrust Section adheres to its belief, expressed in November of 1988, that the "group" concept should not be reintroduced because, among other things, it will complicate compliance with and administration of the Act without the likelihood of significant benefit to substantive antitrust enforcement. (A copy of the portion of our earlier comment addressing this issue is attached hereto as Annex 2 and is incorporated herein by reference.)

The concept of "group" under the federal securities laws can be found in Section 13(d)(3), of the Securities Exchange Act of 1934 (the "Exchange Act"), which states:

> When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

5 U.S.C. § 78m(d)(3).[2] The purpose of this section is to prevent persons who agree to pool their interests in an issuer's securities from evading the disclosure requirements because they individually own less than five percent of the securities. See S. Rep. No. 550, 90th Cong., 1st Sess. (1967) and H. R. Rep. No. 1711, 90th Cong., 2d Sess. (1968), reprinted in [1968] U. S. Code Cong. & Ad. News 2811, 2818. Five percent was chosen because it was

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[2] Sections 13(g)(3) and 14(d)(2) of the Exchange Act are identical to Section 13(d)(3).

felt that the level of investment could have a significant impact on the public market for their Company's stock. [1970] U.S. Code Cong. Ad. News. 5027-5028.

As is readily apparent, the concept of group under the federal securities laws in broad and ill-defined, it is a subjective not an objective definition. Accordingly, there is considerable litigation as to when a group is formed[3] and considerable difficulty in proving the existence of a group.[4]

The Antitrust Section strongly urges the Commission not to adopt this option for four reasons. First, the purpose behind the "group" concept from an SEC perspective is radically different from the purposes of HSR.[5] Indeed, in contrast to a 5% threshold raising securities concerns, in November 1988 this Section endorsed the Commission's proposal to exempt all acquisitions of 10% or less of the outstanding voting securities of an issuer on the grounds that such acquisitions rarely raise antitrust concerns.

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[3] See e.g., GAF Corp. v. Millstein, 453, F.2d 709 (2d Cir. 1971) (court required four shareholders who held more than ten percent of the company's stock to file a Schedule 13D at the time they agreed to pool their holdings); Bath Industries, Inc. v. Blot, 427 F.2d 97, 108-110 (7th cir. 1970) (court held that full disclosure is only required when a group decides to buy additional stock to reinforce its position against management).

[4] Since the essence of a Section 13(d) group is the agreement by its members to act in concert for a common purpose it is often difficult to prove the existence of such an agreement. Thus, some courts have allowed the agreement to be proven by circumstantial evidence and inferences. See, e.g., Champion Parts Rebuilders, Inc. v. Cormier Corp., 661 F. Supp. 825 (N.D. Ill. 1987) (court determined existence of a group from, among other things, (i) a common plan and goal, (ii) a pattern of parallel and continued purchases over a relatively short and essentially concurrent time period, and (iii) two alleged group members' claims of support from the other alleged members at a meeting with management); Jacobs v. Pabst Brewing Co., 549 F. Supp. 1050 (D. Del. 1982) (allegations that an investment manager, which held common stock of an issuer on behalf of its clients, agreed with its clients to act together for the purpose, intent and effect of changing or influencing control of the issuer, were sufficient to state a claim that a group was formed).

Second, adopting such a subjective standard to determine who incurs a filing obligation under HSR and when raises significant, if not insurmountable, administrative hurdles. This is especially true since the composition of a "group" can change over time. For example, if a new member is added, must an additional filing be made? In addition, under the SEC treatment persons can be members of a group although they do not "hold" voting securities of an issuer, as that term is defined for HSR purposes.

Third, as the Commission recognizes in the ANPR, it will be difficult to determine who "controls" a group. Usually, a "group" consists of individual investors, each having a small percentage of stock ownership. If the concept of control is not applied to groups then how are the "assets of the group" to be determined for purposes of the size-of-parties test? Obviously, groups do not regularly prepare financial statements.

Fourth, to require multiple filings by each or several members of the group raises all of the problems of multiple filings discussed in the context of Option Three above and will provide little information of antitrust significance.

In sum, while the term "group" will encompass every partnership, its net will fall far more broadly. Before injecting such uncertainty, at the very least the Commission should try to determine how many 13D filings a year are made where HSR filings presently are not required to get a better idea of the potential effects of this Option, and should further consider, in how many of those situations competitive concerns existed that were not ultimately brought to the attention of the enforcement agencies when a member (or members) of the group were required to file under existing HSR rules.

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[5] It would be anomalous for the FTC to incorporate the law and interpretations of the SEC into its rules in such a way that changes in the SEC's rules and interpretations would directly impact on the requirements under HSR and such that the FTC's ability to interpret its rule would be subject to and limited by SEC actions.

Option Five

The fifth option in the Proposed Notice concerns the adoption of a previous Commission proposal regarding "acquisition vehicles." The Antitrust Section expressed its opposition to this concept in November 1985, at the time it was originally proposed and still has those reservations. Accordingly, we incorporate by reference herein our previously filed comments (See Annex 1.)

Attachment 2
(see footnote 2)
of text

STATEMENT OF

MARK CRANE, CHAIRMAN

SECTION OF ANTITRUST LAW
AMERICAN BAR ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING S.431 & S.432

FEBRUARY 26, 1987

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and are not, and should not be construed as, the views of the American Bar Association.

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

COMMENTS OF THE ANTITRUST SECTION AMERICAN BAR ASSOCIATION

These comments respond to three bills recently introduced to amend Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act"), codified as Section 7A of the Clayton Act, 15 U.S.C. § 18a: (a) H.R. 586 to amend Section 7A of the Clayton Act to extend the waiting periods and to expand the applicability of the notification requirement, to make subject to the Act certain persons who act in concert to acquire voting securities or assets of another person, to require such notification to include an economic impact statement, and for other purposes; (b) S.431 to amend the Clayton Act regarding partnerships; and (c) S.432 to amend the Clayton Act regarding mergers. Since the issues addressed in the House bill overlap to some extent the issues addressed in the two Senate bills, the comments are organized on an issue-by-issue basis rather than addressing the bills separately.

1. Proposed Amendments to 15 U.S.C. § 18a(e) Regarding the Statutory Waiting Periods

Section 7A of the Clayton Act currently provides that no person subject to the jurisdictional requirements of Section

7A(a)(1)-(3) shall acquire, directly or indirectly, any voting securities or assets of any other person until the end of the thirtieth day (or in the case of a cash tender offer, the fifteenth day) after the date of receipt of the required notification. If the Federal Trade Commission ("FTC") or the Assistant Attorney General ("AAG") issues a request for additional information pursuant to Section 7A(e) of the Clayton Act, 15 U.S.C. § 18a(e), it or he has the discretion to extend the initial waiting period for an additional 20 days (or in the case of a cash tender offer, 10 days) after substantial compliance by the person or persons to whom the request was issued.

Both H.R. 586 and S.432 propose to amend Section 7A of the Clayton Act by eliminating the shortened waiting periods for cash tender offers and making the waiting periods for cash tender offers coterminous with the waiting periods applied to other transactions. H.R. 586 goes further and proposes to eliminate the discretion vested in the FTC and the AAG to terminate the additional waiting period prior to its expiration. Finally, both bills propose that the additional waiting period in certain large transactions be 60 days, although they differ as to the proper unit of measurement for the size of transactions. H.R. 586 would require a 60-day additional waiting period if the proposed transaction would result in the acquiring person holding U.S. assets valued at more than $1 billion or having probable annual sales in the U.S. in excess of $1 billion. S.432 would permit the antitrust authorities to impose a 60-day additional waiting period if, as a result of the acquisition, the acquiring person would hold voting securities or assets of the acquired person in excess of $1 billion.

For the reasons set forth below, the Section opposes each of these proposals except the Section does not oppose the proposal to eliminate the Act's shortened additional waiting period for cash tender offers.

(a) Cash Tender Offer Waiting Period

The rationale for the Act's shortened waiting periods for cash tender offers is rooted in the provisions of the Williams Act, and the regulations promulgated thereunder, in force at the time the Act was adopted. The Williams Act, adopted in 1970, amended the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, to regulate, among other things, how long a tender offer must be held open and when shareholders who have tendered into the offer must be allowed to withdraw their shares. In adopting the Williams Act, Congress intended to protect shareholders while maintaining neutrality in the market for corporate control. *Edgar* v. *Mite Corp.*, 457 U.S. 624, 633 (1982).

(i) The Initial Waiting Period

The legislative history to Title II of the Act indicates that Congress adopted shortened waiting periods for cash tender offers in order "to strike a balance between the ten-day [or, in the event that the offer is for 'any and all shares,' seven-day] Williams Act waiting period, and the thirty-day premerger waiting period" established by the Act for all other reportable transactions. H.R. Rep. No. 94-1373, 94th Cong. 2d Sess. 12 (1976).

No substantive antitrust reason exists for providing shortened waiting periods for cash tender offers. In fact, substantive antitrust concerns militate against the shortened waiting periods. Congress noted that "it is simply impossible to analyze the antitrust implications of a cash tender offer" within the 10-day Williams Act waiting period. Id. Congress considered the shortened cash tender offer waiting periods a "compromise" that "should not unduly inhibit" cash tender offers yet "provides the antitrust enforcement agencies with a realistic opportunity to review the antitrust implications of a cash tender offer, before it is consummated." Id. at 12-13.

The Section believes that the goals of not unduly inhibiting cash tender offers yet providing sufficient time for antitrust review should guide the analysis of the proposals to eliminate the Act's shortened waiting periods for cash tender offers. In this regard, the Section believes that eliminating the Act's shortened initial waiting period for cash tender offers may have an inhibiting effect on cash tender offers, without satisfying any identifiable need for the additional time to allow antitrust enforcement agencies to review the antitrust implications of cash tender offers. Accordingly, the Section recommends against eliminating the Act's shortened initial waiting period for cash tender offers.

The waiting periods under the Williams Act have been amended from those in effect at the time of the passage of the Act so that all tender offers (other than self-tenders), regardless of the consideration offered or the number of shares sought, must remain open twenty business days. 17 C.F.R. § 240.14e-1(a). Withdrawal rights remain in effect as long as the offer remains open. 17 C.F.R. § 240.14d-7.

The twenty business day waiting period under the Williams Act can expire as early as the 26th calendar day from the date of commencement of the offer. The initial fifteen calendar-day waiting period under the Act expires well within the Williams Act waiting period (assuming, as is often the case, that the required notification is made on the same day as the offer is commenced, and there is no request for additional information pursuant to Section 7A(e) of the Clayton Act). Under the same assumption, with elimination of the shortened initial waiting period for cash tender offers, the initial waiting period would expire on the 30th day following the date of commencement of the offer which would be 31 days from the date of the commencement of the offer. Thus, the proposed legislation could delay transactions beyond the Williams Act waiting periods even when there are no substantive antitrust concerns.

The additional five calendar days effectively added to the Williams Act waiting period by the proposals may inhibit cash tender offers by "unduly favoring the target firm's incumbent management, and permit[ing] them to frustrate many procompetitive tenders." H.R. Rep. No. 94-1373, 94th Cong. 2d Sess. 12 (1976). The Section recognizes that the Act, at the time it was adopted, imposed a minimum of four additional calendar days on top of the Williams Act waiting period. But this addition was necessary because of the inadequacy of the Williams Act ten-day waiting period for antitrust review. There has been no public suggestion from either antitrust agency that the current 15 calendar-day waiting period allows insufficient time to review the antitrust considerations of cash tender offers. Accordingly, the Section sees no reason to extend the Act's initial waiting period.

(ii) The Additional Waiting Period

Although the Section opposes eliminating the Act's shortened initial waiting period for cash tender offers, it does not oppose eliminating the Act's shortened additional waiting period for cash tender offers. Where a transaction raises sufficient antitrust concerns such that the FTC or the AAG issues a request for additional information, it would be reasonable to permit the agencies 20 days to review the additional information provided by the parties to the transaction. Issuance of a request for additional information indicates that antitrust issues are sufficiently important to warrant delaying the transaction. Moreover, the antitrust enforcement agencies frequently request extensions of the additional waiting period in cash tender offer transactions. All transactions subject to the Act should be subject to the discretionary 20-day additional waiting period in the event of a request for additional information.

H.R. 586 also appears to eliminate the discretion of the FTC or the AAG to terminate the additional waiting period prior to its expiration. The Section does not understand the rationale for this elimination of discretion, particularly in light of the fact that the FTC and AAG's discretion to terminate the initial waiting period prior to its expiration remains unaffected by H.R. 586. To the extent that H.R. 586 does eliminate this discretion, the Section opposes it because it imposes unnecessary burdens on parties to transactions that do not raise substantive antitrust concern. Just as Section 7A(b)(2) of the Clayton Act gives the FTC or the AAG the discretion to terminate the initial waiting period prior to its expiration, Section 7A(e)(2) should provide for discretionary termination of the additional waiting period. Once the antitrust authorities have satisfied themseles that a transaction will not adversely affect competition, they should be permitted to terminate the waiting period so that the parties can complete their transaction.

(b) Proposed 60-day Additional Waiting Period

The provision in S.432 that would permit the antitrust enforcement agencies to impose a 60-day additional waiting period on large transactions is based on the premise that antitrust analysis is more time consuming in large acquisitions than in small ones. The Section questions this premise. The premise of H.R. 586's analogous section imposing a mandatory 60-day additional waiting period -- that acquisitions resulting in large entities require more time to analyze -- is even more troublesome. First, large transactions and acquisitions resulting in large companies can be easier to analyze than smaller transactions and acquisitions by smaller companies because there is often more publicly-available information about the structure and operation of the relevant markets. Second, a transaction may be large in dollar terms or result in the formation of a large company yet involve only limited competitive overlaps; neither the size of the transaction nor the size of the resulting company reveals much about competitive overlaps. Finally, the complexity of the relevant markets, not the size of the transaction or size of the resulting person, is what makes analysis under the agencies' Merger Guidelines difficult and time-consuming. In short, these proposals would extend, or grant antitrust enforcement agencies the discretion to extend, by 40 days the additional waiting periods for a number of transactions where there is no need to do so.

Particularly in the case of H.R. 586, which would eliminate the agencies' discretion to terminate the additional waiting period, the change is likely to tip the balance in the market for corporate control in favor of incumbent management. The prospect of having to keep a tender offer open for longer than three months (30-day initial waiting period, plus one to two weeks to respond to the request for additional information, plus 60-day additional waiting period) may inhibit some procompetitive offers from being made.

Although S.432 at least contains a workable test for differentiating large transactions from small ones, the provision in H.R. 586 for distinguishing transactions makes little sense. H.R. 586 focuses on the U.S. assets and probable U.S. sales of the resulting entity. Accordingly, where the FTC or the AAG requests additional information, it would impose a 60-day additional waiting period on all transactions involving one party with $1 billion in U.S. assets or probable U.S. sales, regardless of the size of the acquisition. "Probable sales" is not defined in the bill or in the present rules, and would be subject to a wide variety of interpretations. Administration of the Act would be complicated because the provision appears to require the parties to the transaction and the FTC to engage in predictions of future sales. At the very least, the concept of probable sales should be abandoned and the test should turn on the sum of the actual sales of the acquiring and acquired person in the most recent year.

There has been no indication from either the FTC or the AAG that the additional waiting periods need to be lengthened for any particular size of transaction to improve enforcement of the antitrust laws, yet both bills would greatly increase those periods. If enacted, these bills could deter procompetitive mergers and acquisitions by greatly increasing regulatory delays to transactions that do not raise significant or difficult substantive antitrust concerns. This is inconsistent with the intent of Congress in enacting the original Act, which was to assist the government in enforcing the antitrust laws applicable to mergers and acquisitions, while avoiding any incidental effect on the market for corporate control unless absolutely necessary. S. Rep. No. 803, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. 1373, 94th Cong., 2d Sess. 5 (1976).

Attachment 3
(see footnote 3)
of text

These views are being presented only on behalf of the Section of Antitrust Law and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the ABA.

COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW ON H.R. 2735, A BILL TO AMEND SECTIONS 7 and 7A OF THE CLAYTON ACT

H.R. 2735, a bill to "amend the Clayton Act by modifying the notification requirements applicable to mergers and tender offers, and for other purposes," was reported by the Subcommittee on Monopolies and Commercial Law to the House Judiciary Committee on June 13, 1985. As reported, the bill would amend Section 7 of the Clayton Act, 15 U.S.C. § 18, to proscribe mergers and acquisitions (including certain joint ventures) which may substantially lessen "potential competition." In addition, pursuant to an amendment offered by Congressman Seiberling, H.R. 2735 would require courts to consider three factors in determining whether acquisitions might substantially lessen competition or potential competition. Briefly, these factors are:

(1) Whether the acquisition would substantially foreclose sources of supply or distribution outlets;

(2) Whether the acquisition would cause the closing of a sufficient number of autonomous regional centers of production and economic decision making; and

(3) Whether debt service or asset divestitures necessitated by the acquisition would significantly weaken the ability of either of the parties to continue to sell at the lowest feasible cost.

Finally, the bill would amend Section 7A of the Clayton Act, 15 U.S.C. § 18a, by extending some of the premerger notification waiting periods provided in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR"). Specifically, the original HSR 15-day mandatory delay between notification and consummation for cash tender offers would be extended to 30 days, which is the waiting period specified for all types of reportable mergers and acquisitions. Furthermore, H.R. 2735 would extend the discretionary waiting period following completion of a request for additional information by one of the antitrust enforcement agencies (known as a "second request") from 20 days (10 days for cash tender offers) to 30 days for all reportable mergers and acquisitions. However, the second request waiting period would be extended to 60 days if the U.S. assets or sales of the combined entities exceeded $1 billion.

For reasons discussed in more detail below, the Section of Antitrust Law opposes this legislation. The principal proposed amendments to Section 7 of the Clayton Act are not merely unnecessary; they would create substantial problems of interpretation for the courts. Because they are not grounded in principles of competition, they would no doubt add a new level of uncertainty to Section 7 analysis, counseling and litigation.

Similarly, the Section of Antitrust Law opposes extension of the HSR waiting periods. There is no evidence that anticompetitive mergers have escaped scrutiny because HSR waiting periods are too short. Nor has a case been made by enforcement officials that more time is required to conduct investigations and to bring litigation challenging prospective mergers.

I. POTENTIAL COMPETITION

Section 7 of the Clayton Act proscribes mergers, acquisitions and certain joint ventures which may substantially lessen competition. The term "competition" in Section 7 of the Clayton Act is not limited or qualified. Thus, since at least 1964, it has been settled that Section 7 is applicable to mergers which may eliminate "potential competition" as well as those which may lessen actual competition. United States v. Continental Can Co., 378 U.S. 441 (1964); United States v.Penn-Olin Chemical Co., 378 U.S. 158 (1964); and United States v. El Paso Co., 376 U.S. 651 (1964). Since that time, federal appellate courts have consistently recognized the theory and have, at the request of plaintiffs, routinely analyzed challenged mergers with an parties to survive. Again, these are social concerns which do not belong in an antitrust statute where competition and the consumer welfare it produces are the fundamental values being protected.

The third factor also focuses on whether the weakened firm can continue to sell at the "lowest feasible cost." The term "lowest feasible cost" has no recognized financial or economic meaning, and thus would introduce a new and highly speculative standard into Section 7 which would be very difficult for courts to interpret and apply. Its addition would thus no doubt unduly complicate merger evaluation and litigation.

III. THE HSR WAITING PERIODS

The Section of Antitrust Law understands that none of the current antitrust enforcement officials at the Department of Justice and the FTC have provided any support for the provisions in H.R. 2735 which would extend the HSR waiting periods to give enforcement personnel more time to investigate and, if necessary, enjoin prospective mergers. Furthermore, the Section is not aware of any evidence that anticompetitive mergers have been consummated because enforcement officials did not have time to complete their investigations and initiate challenges within current HSR waiting periods.

Under these circumstances, the Section of Antitrust Law opposes any changes in the HSR waiting periods. Obviously, the current waiting periods have on occasion placed enforcement personnel under strain and pressure, particularly when faced with some of the multi-billion dollar mergers which have been announced in recent years. But there is no known evidence that these dedicated people were unable to perform competently because of time constraints. Moreover, according to the Justice Department, in "rare" cases where the HSR "time periods may not be sufficient, the enforcement agencies generally have been able to negotiate voluntary extensions because firms are reluctant to consummate transactions that may be challenged."[6]

In the absence of substantial evidence of need from those on the firing line, the Section of Antitrust Law cannot support an extension of the HSR waiting periods. Indeed, an extension of the waiting periods might have at least two costly consequences: (1) lengthier, but not necessarily more thorough, investigations; and (2) failure to achieve a consummation of some mergers due to the passage of time which is one of the chief obstacles to mergers, especially hostile takeovers. Real costs and economic losses may well be associated with either of these two consequences.

6/ See letter dated July 8, 1985 from Phillip D. Brady, Acting Assistant Attorney General, U.S. Department of Justice, to Honorable Peter W. Rodino, Jr. at 3.

Senator **Metzenbaum**. Mr. Pfunder, I appreciate your testimony. If the ABA Antitrust Section wishes to have some input with our staff, we would be happy to discuss it with you, but let me see if I can summarize.

On S. 994, do you support it or oppose it?

Mr. **Pfunder**. On S. 994, the Section has not authorized me to take a specific position on those provisions, but the ABA has previously supported de minimis proposals for amendment of Section 8 of the Clayton Act, and the only thing I can do this morning is reiterate the existence of those prior positions.

Senator **Metzenbaum**. S. 995?

Mr. **Pfunder**. On S. 995, the positions differ with the respective issues that I went through in some detail.

Senator **Metzenbaum**. Some you do and some you do not?

Mr. **Pfunder**. Yes, and in S. 996, the ABA is specifically on record as endorsing the proposition that the United States ought to be able to recover triple damages for violations of the antitrust laws.

Senator **Metzenbaum**. Thank you very much.

Mr. **Pfunder**. Thank you, sir.

Senator **Metzenbaum**. Mr. Dempsey, happy to have you with us this morning, sir.

STATEMENT OF MR. DEMPSEY

Mr. **Dempsey**. Thank you, Mr. Chairman. I am glad to be here. I am accompanied by Mr. Jay Thomas Tidd, who is the association's vice president of law, and I presently with the Association of American Railroads.

We are here to testify about a relatively narrow issue, but one that is important to the rail industry and that has to do with Section 10 of the Clayton Act.

S. 994, as you know, does not deal with Section 10, but a comparable bill in the House, as I know you also are aware, H.R. 29, would do two things.

It would repeal Section 10, which applies only to common carriers and it would extend Section 8 to common carriers by eliminating the exemption that is now in Section 8 respecting common carriers. And that is the approach that we would urge upon you, Mr. Chairman, and upon the Senate.

We think that Section 10 is discriminatory and it has long, long ago lost its purpose. As you know, it prohibits the railroads from having any dealings in securities or articles of commerce or supplies with another corporation with which it has a common director or officer, except in accord with very, very intricate competitive bidding procedures that are prescribed by the Interstate Commerce Commission.

I have set forth those procedures in my statement. They are very, very detailed, very burdensome. They require preparation of detailed specifications, repeated publications in designated newspapers, precise bid opening and review procedures, explanations as to why you have turned down or accepted a contract bid, and keeping of all records for a period of 10 years.

Now this does not go on anyplace else in the United States. I will just read to you, by way of example, a passage from a leading treatise on corporate law, Fletcher's Encyclopedia of Corporation Law, which says this, and I am quoting, "We have seen that the rules of law regarding transactions between corporations having interlocking directors are very strict and to meet modern business conditions it has become customary to insert in the articles or certificate of incorporation or by-laws provisions permitting interested directors to contract with the company in question with the corporation and permitting contracts between corporations with common directors."

So here we have the practice and the rest of corporate America opposed against this very, very different provision in Section 10 of the Clayton Act.

Now it was adopted, of course, in 1914, and that is quite is a different era. It was designed to prevent them plundering of the railroad or supplier by another through a corrupt action involving interlocking directorates. There is no justification today, whatever the justification might have been then, for having a ruled law different for the railroads.

In 1914, the railroad industry was probably the dominant industry in the United States. Now in 1988, there are 325 corporations in this country with revenues in excess of $1 billion and there are only 7 railroads in that class. And they are almost at the bottom of the corporate scale among major industries in the United States in the ability to inflict damage on the economy through corrupt intercorporate transactions.

These costs that the industry undergoes is not limited to a burdensome bidding process, and that is a burdensome bidding process. The greater costs really are of the lost opportunities for undertaking inter-corporate business transactions which make economic sense, and even more importantly, the cost imposed by the necessity to maintain an information system, which identifies the existence of interlocks in order to avoid an inadvertent violation of Section 10.

And that is becoming increasingly difficult. Given the movement in recent years to large and disparate corporate mergers and consolidations, it is not a simple matter to determine the potential of an inadvertent violation of Section 10.

Now there would be no legal vacuum if Section 10 were eliminated. There are numerous laws that govern corporate transactions which have been enacted since 1914. They apply to the railroads and would apply to the railroads. And as I have indicated, we have no objection to having Section 8 amended so that it would also apply to railroads, even though, as a matter of fact, it would duplicate Section 11322 of Title 49, which requires ICC approval of any interlocking directorates.

A former chief of the Transportation Section of the Antitrust Division described and I think aptly Section 10 as, and I quote, "not truly an antitrust law, but a regulatory statute, which ignores market realities and which was designed to meet a problem which has long since faded."

That concludes my statement, Mr. Chairman.

[The statement of Mr. Dempsey follows:]

Statement of
William H. Dempsey, President
Association of American Railroads
in Hearings on Interlocking Directorates
Before the
Committee on the Judiciary
U.S. Senate

July 25, 1989

Mr. Chairman and members of the Subcommittee, I appreciate this opportunity to present the views of the Association of American Railroads (AAR) on provisions of the Clayton Act dealing with interlocking directorates and officers. Two sections of the Clayton Act are involved--section 8 which limits interlocks between banks and between competing corporations (excepting common carriers regulated by the Interstate Commerce Commission (ICC)), and section 10 which requires competitive bidding on contracts between a common carrier and a corporation having any of the same directors or officers.

S. 994, the bill before the Committee, deals only with section 8. It would amend that section by raising the threshold of its applicability and eliminating the separate provision for banks. Under existing law an interlock is prohibited if either of the corporations involved in the interlock has capital, surplus and undivided profits aggregating more than $1 million. Under S. 994, the threshold would be increased to $10 million for each of the competing corporations (with 3 exceptions based on the level of competitive sales). A similar bill (H.R. 29), now pending before the House Judiciary Committee would go further. It would extend section 8 to all industries (by eliminating the exception contained therein for common carriers) and repeal section 10 which is applicable only to common carriers regulated by the ICC. Because section 10 is an outdated provision which imposes needless restrictions and expenses upon the railroad industry, the AAR urges the Committee to adopt the approach taken by the House bill.

Under section 10, "any dealings in securities, supplies, or other articles of commerce" or "any contracts for construction or maintenance of any kind" between a railroad and another corporation having a common director or officer is subject to a competitive bidding requirement regulated by the ICC if the amounts in the aggregate in any one year exceed $50,000.

What does it mean to have these transactions subject to a regulated competitive bidding requirement? First, the railroad must prepare a request for bids

> ". . . setting forth clearly and so far as applicable in each case in detail a description or descriptions of the matters and things for which bids are requested, the terms, times and conditions of delivery and payment, the place or places where delivery or performance is to be made, the character, amount, and terms of securities offered or sought, and a full

> description of the supplies or other articles required or offered for sale, hypothecation, or purchase, and shall make and attach to such specifications such maps, drawings, and illustrations and state such other substantial facts or conditions as are or may be necessary to a full understanding of the premises and procedure by bidders. Such specifications, drawings and illustrations in each case shall be kept open at the principal office or offices of the carrier for full examination, free of charges, by persons desiring to examine the same with a view to bidding, and, upon request, such carrier shall furnish to any person or persons desiring the same true and accurate copies of such specifications, maps, drawings and illustrations. . . .(49 C.F.R. §1010.1 (1987))

Second, the request for bids must be published

> ". . . in at least two daily newspapers of general circulation, at least two publications in each week for 2 weeks, the first publication to be at least 2 weeks immediately preceding the day when the bids are to be submitted; one such newspaper shall be published or shall be of general circulation in the city or town where the principal operating office of the carrier is located and the other newspaper shall be published in one other of the following cities nearest to the operating or financial office of the carrier or the place where the contract is to be performed, namely: New York, N.Y., Boston, Mass., Chicago, Ill., St. Louis, Mo., Atlanta, Ga., San Francisco, Calif., and Portland, Oreg.; and a printed copy of the published notice in each case shall be posted in plain view, for 2 weeks immediately preceding the day on which bids are to be received, on a bulletin board, designated for that purpose, in a public and conspicuous place in the building where the principal operating office of the carrier is located. (*Id.*)

Third, after receiving and opening the bids, the railroad

> ". . . shall within 48 hours in cases where the sale or purchase of securities is the undertaking, and within 21 days where bids are for

> supplies, equipment, other articles of commerce and for construction or maintenance work, accept the most favorable bid considering (a) the lowest price or prices for the supplies, equipment, and other articles of commerce, and for the construction or maintenance work, described in the advertisement, and the highest price or prices offered for any securities or property, so described, for sale by the carrier, and (b) the ability and reliability of the bidder, financial and otherwise, to deliver the property or to perform the work or transaction, or to pay for the securities, described in the advertisement, giving due consideration to any bond or security tendered by the bidder. (Id. at §1010.3)

Fourth, upon executing the contract, the railroad

> ". . .shall within 30 days after the execution of such contract file with the Interstate Commerce Commission a statement of the transaction giving, (a) a copy of the published notice; (b) the names of all bidders, and, if the bidder be a corporation, the names and addresses of the officers, directors and general managers thereof and of the purchasing or selling officer or agent in that transaction, or if the bidder be a partnership or firm, the names and addresses of the members of the firm, the general manager and purchasing or selling agent thereof, and the total amount of each bid; (c) the name of the bidder to whom the contract was awarded together with a copy of the contract; and (d) if any other than the lowest or the highest bid, as the case may be, is accepted as being most favorable to the carrier, the reasons for such acceptance. The statement shall be made in typewriting, in pamphlet form on pages not less than 8 by 10-1/2 inches in size nor greater than 9-1/2 inches by 12 inches, in size, bound on the longer edge of the page, the paper to be of durable quality fit for permanent record. (Id. at §1010.4)

Finally, the railroad must preserve and keep open for examination by the Commission for a period of 10 years all documents affecting the transaction which

> ". . . shall be securely fastened together and given the contract number and each document

> therein shall be numbered consecutively and at the conclusion there shall be a sworn statement by the president, a vice president, or the general manager of the carrier, stating that the files in No. _______ contain true and complete records and statements of all the negotiations had in connection with the contract therein set forth." (Id. at §1010.5)

Given these regulatory requirements, one would assume that only where there was no alternative would a railroad knowingly seek to contract with an interlocking company. Available data confirms the assumption. ICC records indicate no more than 6 filings in any of the last 5 years. A more important figure, which it is not possible to determine, is the number of transactions foregone because of the section 10 requirements that would have been advantageous both to the railroad and the interlocked corporation.

The losses to a railroad in complying with the bidding process, or foregoing advantageous contracts because of it, represent only part of the full cost burden imposed by section 10 and the implementing regulations. A substantial additional cost is imposed on a railroad in maintaining the records and procedures necessary to avert unintended violations of the law.[1] The industrial mergers that have occurred in the last 20 years have greatly complicated the task of determining even that interlocking directorates exist. In a typical railroad, the corporate secretary must circulate a questionnaire periodically to all directors and officers in order to identify all companies, subsidiaries and divisions with which there is any affiliation. The list may run to 10 pages. That list is then circulated to all offices within the railroad to assure that section 10 transactions are not inadvertently entered into. Precise figures are not available but, based on the experience of one large railroad, this activity costs the railroad industry hundreds of thousands of dollars each year.

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[1] The company itself is subject to a $25,000 fine for a violation of section 10 and directors or officers who have "aided or abetted" a violation are subject to a $5,000 fine and one year in jail.

The rationale for imposing these costs on the railroad industry as a necessary price for protecting the public interest lost its force long ago. When the Clayton Act was passed in 1914, the railroads were still the single most important industry in the United States, and section 10 was aimed at correcting some unique financing and purchasing abuses occurring between railroads and companies with which they were interlocked. While the railroad industry may have warranted such special legislative attention in 1914, plainly, it does not now.

More than years separate the industrial America of 1914 and that of today. In 1988, the railroads are relatively small players on our industrial stage. Last year, there were 9 Fortune 500 companies with revenues greater than the combined revenues of the Class I railroads. Of the companies listed in the Fortune 500 with sales over $1 billion, there are

- 15 in Aerospace
- 5 in Apparel
- 8 in Beverages
- 12 in Building Materials
- 31 in Chemicals
- 14 in Computers
- 31 in Electronics
- 34 in Food
- 24 in Forest Products
- 19 in Industrial & Farm Equipment
- 25 in Metal Products
- 6 in Mining
- 14 in Motor Vehicles & Parts
- 27 in Petroleum Refining
- 14 in Pharmaceuticals
- 12 in Publishing
- 7 in Rubber Products
- 9 in Scientific & Photo Equipment
- 7 in Soaps & Cosmetics
- 7 in Textiles
- 4 in Tobacco

In 1988, there were only 7 railroads with revenues in excess of $1 billion. On this scale of corporate importance in America, the railroad industry is only a couple of notches above wearing apparel and a notch below beverages.

Since the abuses to which section 10 is directed could now be committed by any number of the corporations in the Fortune 500, why has the Congress not found it necessary to subject them to the same burdens and costs as those placed on the railroads by that section? I think the reason is clear. Since 1914, a plethora of other laws applicable to the directors and officers of all corporations--including railroads--have been enacted which now amply protect the public against those abuses.

Both at the state and federal level corporate conflict-of-interest and securities laws are now in place imposing strict fair-dealing and disclosure requirements on corporate officers and directors. Under the corporation laws of the various states (which both codify and expand upon common law liability principles) officers and directors of a corporation are generally held to a fiduciary obligation requiring them to act in good faith in their dealings on behalf of the corporation and its stockholders. A breach of fiduciary obligation, such as a wrongful diversion of corporate assets to a party in which the officer or director has an interest, may be remedied through an action filed by the corporation or its shareholders (on behalf of the corporation) to void or recover damages for such unfair dealing.[1] Moreover, in an appropriate case punitive damages may be imposed under state law upon the self-dealing officer or director.[1]

At the federal level the securities laws (to which railroads and other carriers are subject) impose broad disclosure and reporting requirements upon publicly-held corporations and their officers and directors.[1] Regulations adopted under the Securities Exchange Act of 1934, for example, require virtually every public company to report any non-competitively bid transaction over $60,000 in which a director or officer has a direct or indirect interest.[1]

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[1] See generally 3 Fletcher Cyc. Corp. §§ 961 et seq. (Perm Ed). See also Revised Model Business Corporation Act §8.31 (reprinted in 1 Fletcher, Cyc. Corp. §2.25 (1988 Cum. Supp.)).

[1] Id. at §838.

[1] See, e.g., 15 U.S.C. §78.

[1] 17 C.F.R. 229.404 (1988).

These requirements are designed to reveal to the public and shareholders the financial condition of the reporting corporation as well as any conflicting financial interests of officers and directors with respect to corporate transactions. Such disclosure and reporting requirements, coupled with the remedies provided by state corporation and federal securities laws, ensure the ability of the corporation and its shareholders to recover for any damages inflicted on the corporation as a result of self-dealing by officers and directors.

In addition to the laws of general applicability, the railroads are separately subject to several other laws dealing with securities or conflicts of interest. Thus, the ICC must approve the issuance of securities by a railroad.[6] The ICC must also approve the appointment of a director or officer of one railroad to a position on another railroad.[7] And a railroad director or officer is prohibited from receiving any benefit from the sale of the railroad's securities.[8] Finally, the federal criminal code specifically outlaws the willful misapplication of the funds or assets of a common carrier by an officer or director.[9]

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[6] 49 U.S.C. §11301.

[7] 49 U.S.C. §11322.

[8] Id.

[9] 18 U.S.C. §660.

I believe it is plain beyond dispute that section 10 is a burdensome anachronism and that its repeal would further the public interest. One writer has aptly described the section as an "atrophied appendix" to the Clayton Act whose repeal "would have little practical effect other than to peel one layer from the onion of bureaucracy."[12] In a speech calling for the repeal of section 10, a former Chief of the Transportation Section of the Antitrust Division observed that: "It is not truly an antitrust law, but a regulatory statute which ignores market realities. It is a statute unchanged since 1914, designed to meet a problem which has long since faded. . . ."[13]

The Association of American Railroads strongly urges the Committee to favorably report legislation relieving the railroad industry of the burden of section 10 and placing it on a more equal footing with the rest of corporate America.

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[12] M. Lauck Walton, Interlocks Between Common Carriers and Companies Dealing With The Carrier, 45 ICC Practitioners Journal 452 (1978).

[13] Remarks by Elliott M. Seiden, before the Delta Mu Alpha Transportation Seminar, Dearborn, Michigan, May 20, 1981.

SUMMARY OF LEGISLATION AMENDING ANTITRUST LAWS

INTERLOCKING DIRECTORATES (S. 994)

SECTION 8 OF THE CLAYTON ACT PROHIBITS AN INDIVIDUAL FROM SERVING AS A DIRECTOR OF TWO COMPETING COMPANIES. THE BILL RAISES THE THRESHOLD TEST FOR CORPORATIONS COVERED BY THE BAR ON INTERLOCKING DIRECTORATES FROM ONE MILLION DOLLARS TO TEN MILLION DOLLARS. SECOND, THE BILL CREATES A "DE MINIMUS" EXCEPTION TO THE FLAT BAR ON A SINGLE PERSON SERVING ON THE BOARD OF COMPETING COMPANIES IF THE AFFECTED SALES CONSTITUTE LESS THAN 1) $1 MILLION FOR EITHER COMPANY; 2) 1% OF EITHER COMPANY'S SALES; OR 3) 4% OF BOTH COMPANY'S SALES. FINALLY, THE BILL ADDRESSES EXPANDS THE RULE TO APPLY TO NOT ONLY CORPORATE DIRECTORS, BUT ALSO SENIOR OFFICERS. LAST YEAR, THE SENATE APPROVED THE MODIFICATIONS TO SECTION 8 THAT ARE CONTAINED IN THIS BILL.

ANTITRUST PROCEDURES REFORM ACT OF 1989 (S. 995)

THIS BILL CONTAINS PROVISIONS APPROVED BY THE SENATE LAST CONGRESS, AND CERTAIN NEW PROVISIONS. LAST CONGRESS, THE SENATE APPROVED CHANGES TO THE HART-SCOTT-RODINO PREMERGER NOTIFICATION PROVISIONS OF THE CLAYTON ACT WHICH WOULD CLOSE THE PARTNERSHIP LOOPHOLE FOR PREMERGER FILINGS, EXTEND THE REVIEW PERIOD FOR ACQUISITIONS, AND RAISE THRESHOLDS FOR REPORTING MERGERS. THIS BILL INCLUDES, IN ADDITION, PROVISIONS WHICH WOULD INCREASE CRIMINAL FINES AND CIVIL PENALTIES AVAILABLE TO THE GOVERNMENT FOR VIOLATIONS OF THE ANTITRUST LAWS, PERMIT THE FEDERAL TRADE COMMISSION TO PROSECUTE VIOLATIONS OF PREMERGER NOTIFICATION REQUIREMENTS, AND ESTABLISH FILING FEES FOR PREMERGER NOTIFICATION FORMS.

I. CRIMINAL FINES

THIS LEGISLATION WOULD INCREASE THE FINES FOR CRIMINAL VIOLATIONS OF THE SHERMAN ACT TO TEN MILLION DOLLARS FOR CORPORATIONS AND TO TWO HUNDRED FIFTY THOUSAND DOLLARS FOR INDIVIDUALS.

II. HART-SCOTT-RODINO ACT AMENDMENTS

THIS MEASURE PROPOSES SEVERAL MODIFICATIONS TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976.

A. TIME FOR REVIEW OF MERGERS

THE PROPOSAL WOULD LENGTHEN THE TIME GIVEN TO THE ANTITRUST ENFORCEMENT AGENCIES TO COMPLETE THEIR REVIEW IN THE CASE OF LARGE OR COMPLEX MERGERS AND IN THE CASE OF CASH TENDER OFFERS. THESE EXTENSIONS WERE APPROVED BY THE SENATE WITHOUT OPPOSITION LAST CONGRESS.

UNDER EXISTING LAW FOR CASH TENDER SITUATIONS, THE ENFORCEMENT AGENCIES HAVE AN INITIAL 15 DAY PERIOD TO DETERMINE WHETHER A MORE DETAILED INVESTIGATION OF A PROPOSED ACQUISITION IS WARRANTED AND TO REQUEST ADDITIONAL INFORMATION FROM THE MERGING PARTIES. THE STATUTE CURRENTLY GIVES THE AGENCY ONLY 10 DAYS TO REVIEW MATERIALS SUBMITTED BY THE PARTIES. IN A NON-CASH TENDER SITUATION, THE INITIAL PERIOD IS 30 DAYS AND THE SECOND PERIOD IS 20 DAYS. THE PROPOSAL EXTENDS BOTH THE INITIAL WAITING PERIOD AND THE SECOND WAITING PERIOD FOR CASH TENDER ACQUISITIONS TO 20 DAYS.

IN ADDITION, THE BILL PROVIDES FOR A PROCESS BY WHICH THE ENFORCEMENT AGENCIES MAY SEEK ADDITIONAL TIME TO REVIEW PARTICULARLY COMPLEX MERGERS. UNDER THIS PROVISION, THE AGENCIES MAY REQUEST THAT A COURT EXTEND THE STATUTORY WAITING PERIOD BY AN ADDITIONAL 25 DAYS UNDER CERTAIN CIRCUMSTANCES.

B. PARTNERSHIP LOOPHOLE

THIS PROVISION WOULD CLOSE A LOOPHOLE THAT CURRENTLY EXISTS IN THE CLAYTON ACT WHICH ALLOWS INDIVIDUALS AND CORPORATIONS TO EVADE THE REQUIREMENTS OF THE PREMERGER NOTIFICATION PROGRAM MERELY BY FORMING A PARTNERSHIP.

LAST YEAR, THE FTC PROMULGATED A RULE WHICH REQUIRES ANY PERSON HOLDING A CONTROLLING INTEREST, I.E., 50 PERCENT OR MORE, IN A PARTNERSHIP TO FILE PREMERGER NOTIFICATION FORMS WITH THE ENFORCEMENT AGENCIES AS THE PARENT ENTITY OF THE PARTNERSHIP. THIS RULE DOES NOT, HOWEVER, REQUIRE PARTNERSHIPS IN WHICH NO PARTNER CONTROLS AT LEAST 50 PERCENT OF THE VENTURE TO FILE. AS A RESULT, WHILE THE FTC HAS NARROWED THE LOOPHOLE SOMEWHAT BY ITS NEW RULE, THE LOOPHOLE STILL EXISTS WHEREBY INDIVIDUALS OR CORPORATIONS CAN CREATE A NEW PARTNERSHIP WITH NO PARTNER HOLDING 50 PERCENT AND AVOID THE FILING REQUIREMENTS OF THE CLAYTON ACT. FOR EXAMPLE, A PARTNERSHIP MADE UP OF EXXON, MOBIL AND CHEVRON, EACH HOLDING A ONE-THIRD INTEREST, COULD CREATE A ENTITY TO PURCHASE THE ASSETS OF SOME BUSINESS AND THE TRANSACTION WOULD NOT BE REPORTABLE BECAUSE, UNDER CURRENT INTERPRETATIONS, NO PERSON "CONTROLS" THE PARTNERSHIP. UNDER THIS BILL, ANY GENERAL PARTNER OF THE ACQUIRING PARTNERSHIP THAT MEETS THE SIZE OF PERSON TEST MAY BE REQUIRED TO FILE NOTIFICATION FORMS AS DETERMINED BY THE FEDERAL TRADE COMMISSION.

THE FTC HAS RECENTLY PROPOSED ANOTHER RULE AND IS REVIEWING FIVE OPTIONS FOR CLOSING THE LOOPHOLE. IF THE FTC EFFECTIVELY CLOSES THE LOOPHOLE, OUR PROPOSAL WOULD NOT BE NECESSARY. HOWEVER, IF THE FTC IS NOT ABLE TO FASHION A RULE THAT CLOSES THE PARTNERSHIP LOOPHOLE ONCE AND FOR ALL, THIS LEGISLATION WOULD ACCOMPLISH THAT GOAL. THE INTENT OF THE PREMERGER NOTIFICATION PROGRAM WAS NOT TO FAVOR CERTAIN TRANSACTIONS EFFECTED BY MEANS OF A PARTNERSHIP. A SIMILAR PROVISION WAS APPROVED BY THE SENATE LAST CONGRESS.

C. FILING FEES

THE BILL PROVIDES FOR FILING FEES FOR THOSE PERSONS MAKING PREMERGER NOTIFICATION REPORTS. FILING FEES ARE COMMON WITH SEVERAL OTHER REGULATORY AGENCIES THAT DEAL WITH SPECIFIC BUSINESS TRANSACTIONS. FOR EXAMPLE, THE UNITED STATES PATENT OFFICE COLLECTS APPLICATION FEES FOR PROCESSING PATENTS AND TRADEMARKS AND FOR VARIOUS SERVICES OFFERED BY THE PATENT OFFICE. 37 C.F.R. SECTION 1. IN 1987, THE PATENT OFFICE COLLECTED OVER 50 PERCENT OF ITS TOTAL BUDGET THROUGH APPLICATION FEES. SIMILARLY, THE FEDERAL COMMUNICATIONS COMMISSION COLLECTS GENERAL APPLICATION FEES FOR LICENSES. THOSE FEES RANGE FROM $25 TO $2,000 PER APPLICATION. AGAIN, THIS INCOME AMOUNTED TO ONE-HALF OF THE FCC'S OPERATING BUDGET FOR 1988. THE FEDERAL ENERGY REGULATORY COMMISSION HAS ESTABLISHED FILING FEES FOR A VARIETY OF APPLICATIONS WHICH REQUIRE REGULATORY APPROVAL, INCLUDING ANNUAL FILINGS THAT ARE REQUIRED BY LAW. FEES EFFECTIVE MAY, 1988 RANGE FROM $100 FOR REVIEW OF REMEDIAL ORDERS CONCERNING SMALL PROJECTS TO A MAXIMUM OF $19,450 FOR PIPELINE CERTIFICATE APPLICATIONS.

THE SECURITIES AND EXCHANGE COMMISSION USES A VARIETY OF APPLICATION FEES FOR PROCESSING FILINGS RELATED TO SECURITIES TRANSACTIONS AND REGISTRATION STATEMENTS. THESE FEES ARE BASED ON A PERCENTAGE OF THE VALUE OF THE TRANSACTION. FOR EXAMPLE, AN APPLICANT MUST PAY A FEE EQUAL TO ONE-FIFTIETH OF 1 PERCENT OF THE "MAXIMUM AGGREGATE PRICE AT WHICH THE SECURITIES ARE PROPOSED TO BE OFFERED," OR A MINIMUM FEE OF $100, UPON FILING A REGISTRATION STATEMENT. 15 U.S.C. SECTION 77f(b). FEES COLLECTED BY THE SEC ARE DEPOSITED IN THE U.S. TREASURY AND AMOUNTED TO NEARLY 200 PERCENT OF THE TOTAL BUDGET OF THE SEC IN 1988.

THE FEES CONTAINED IN THIS BILL WOULD AMEND THE EXISTING REQUIREMENTS FOR HART-SCOTT-RODINO PREMERGER FILINGS. THE ACQUIRING PARTY WOULD PAY A FEE OF ONE-FIFTIETH OF 1 PERCENT OF THE VALUE OF THE TRANSACTION, UP TO A MAXIMUM OF $50,000, IN CONJUNCTION WITH FILING ITS NOTIFICATION FORM. THIS FEE SYSTEM WOULD GENERATE APPROXIMATELY $20 MILLION TO BE DIVIDED EVENLY BETWEEN THE FTC AND THE DEPARTMENT OF JUSTICE FOR USE IN ANTITRUST ENFORCEMENT ACTIVITIES.

D. ENFORCEMENT

THIS BILL WOULD PERMIT THE FEDERAL TRADE COMMISSION TO SUE ON ITS OWN BEHALF FOR VIOLATIONS OF ITS PREMERGER NOTIFICATION RULES. THE FEDERAL TRADE COMMISSION IS CURRENTLY EMPOWERED TO INVESTIGATE VIOLATIONS OF HART-SCOTT-RODINO FILING REQUIREMENTS AND TO ESTABLISH RULES NECESSARY TO CARRY OUT THE PURPOSES OF THE PREMERGER NOTIFICATION PROGRAM. 15 U.S.C. SECTION 7A(D). THIS WOULD FACILITATE FTC ENFORCEMENT OF PREMERGER NOTIFICATION VIOLATIONS AND REDUCE THE BURDEN ON THE DEPARTMENT OF JUSTICE IN BRINGING THESE SUITS IN BEHALF OF THE FTC.

E. CIVIL PENALTIES

THIS PROPOSAL WOULD INCREASE THE PENALTY FOR VIOLATIONS OF THE PREMERGER NOTIFICATION REQUIREMENTS OF THE CLAYTON ACT. CURRENTLY, THE PENALTY FOR SUCH VIOLATIONS IS $10,000 FOR EACH DAY THE COMPANY IS FOUND TO BE IN VIOLATION. THIS BILL WOULD INCREASE THE DAILY PENALTY TO $100,000, AND WOULD PERMIT THE COURT TO ORDER ADDITIONAL EQUITABLE RELIEF.

F. FILING THRESHOLD

UNDER CURRENT STANDARDS, A PROPOSED MERGER MUST BE REPORTED TO THE ANTITRUST AGENCIES IF: (1) EITHER PARTY TO THE MERGER IS ENGAGED IN COMMERCE OR AN ACTIVITY AFFECTING COMMERCE; (2) ONE PARTY HAS TOTAL ASSETS OR ANNUAL NET SALES OF $10 MILLION OR MORE, AND THE OTHER PARTY HAS TOTAL ASSETS OR ANNUAL NET SALES OF $100 MILLION OR MORE; AND (3) AFTER THE ACQUISITION, THE ACQUIRING PERSON WOULD HOLD 15 PERCENT OR MORE OF THE VOTING SECURITIES OR ASSETS OF THE ACQUIRED PERSON, OR MORE THAN $15 MILLION OF THE ACQUIRED PERSON'S VOTING SECURITIES AND ASSETS.

THIS BILL RAISE THE THRESHOLD FOR PERSONS REQUIRED TO FILE FROM $10 MILLION TO $15 MILLION, AND WOULD RAISE THE THRESHOLD FOR EXEMPT TRANSACTIONS FROM $15 MILLION TO $30 MILLION.

SUMMARY OF THE GOVERNMENT REMEDIES IMPROVEMENT ACT OF 1989
(S. 996)

THE PROPOSAL AMENDS THE CLAYTON ACT TO PERMIT THE GOVERNMENT TO RECOVER TREBLE DAMAGES IN CIVIL SUITS ARISING OUT OF THE ANTITRUST LAWS.

Senator METZENBAUM. Mr. Dempsey, do railroads or other common carriers normally conduct open bidding in their procurement practices?

Mr. DEMPSEY. Do they normally conduct open bidding?

Senator METZENBAUM. Yes.

Mr. DEMPSEY. No.

Senator METZENBAUM. Do they normally have open bidding in any situation?

Mr. DEMPSEY. No. This provision is so burdensome that competitive bidding is rarely engaged in these circumstances. Oh, I see. Your question is broader though.

In these circumstances, there have been only—where there have been less than six transactions that there has been competitive bidding on because of Section 10 in any of the last 5 years, it is just too much trouble. So they do not do it.

Now your question though more broadly, right. And I am not—I do not believe so, but I am reluctant to answer that definitively. Let me give you a prepared response to that.

Senator METZENBAUM. We would appreciate you doing that in writing if you would, please.

Mr. DEMPSEY. I will have to inquire with the railroads.

Senator METZENBAUM. Mr. Pfunder, recently a special committee of the ABA Antitrust Section studied the antitrust role of FTC. The committee made the following observations:

"FTC work years are 53 percent of what they were a decade ago. The current staff level is cause for serious concern. We urge that the Commission make better use of its resources, that the decline in real resources be halted, and that an increase in resources be provided."

A report issued this month by the ABA Section on Antitrust Task Force on the Department of Justice Antitrust Division contained this conclusion:

"The Antitrust Division continues to have broad support for its significant role in preserving competition and protecting consumer welfare. The importance of this role is underscored by the task force's consensus that the two most important tasks for the Division in this new antitrust era are, one, the articulation in pursuit of a positive enforcement agenda; and, two, the reinvigoration of the Division's resources and staff."

I take it from these strong conclusions that there is a general consensus among antitrust lawyers that antitrust enforcement at both the FTC and DOJ is suffering from lack of resources. Would you agree?

Mr. PFUNDER. Senator, I personally would agree very strongly with that statement. Obviously, I cannot speak for the ABA on that subject, but as a former participant in that process, it seems to me to hit the nail right on the head.

Senator METZENBAUM. Let me be certain that I understand. Where are you on this—I think you said it, but I just want to be certain and clear on it.

Where are you on the question of increased fees with respect to the filings?

Mr. PFUNDER. The Antitrust Section did not take a position on that on grounds basically that we did not see that as an antitrust issue as such. We recognize there are some very difficult political issues and a serious issue of whether the proposal is a workable way of augmenting the resources that are available to the two enforcement agencies.

I am sure that the Section has not only no objection, but would welcome increased funding for the two enforcement agencies.

We did not feel it appropriate to endorse this mechanism as a mechanism that would necessary——

Senator **Metzenbaum**. You certainly do not oppose it?

Mr. **Pfunder**. Absolutely not.

Senator **Metzenbaum**. And is it fair to say that those of you who are practitioners in this field would recognize that the amount of money involved is de minimis, totally insignificant as far as costs are concerned?

Mr. **Pfunder**. Well, in overall terms, I think that is true. It obviously is going to have in impact on individual companies involved in individual transactions, but one-fiftieth of 1 percent as a filing fee is a small amount by comparison to the other transaction costs that these kinds of mergers and acquisitions generate.

Senator **Metzenbaum**. A couple of hours work for the lawyers. With that, I think we will conclude this hearing.

Thank you very much, Mr. Dempsey.

Mr. **Dempsey**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you, Mr. Pfunder.

[Whereupon at 10:55 a.m., the committee adjourned.]

101st CONGRESS
1st Session

S. 994

To amend the Clayton Act regarding interlocking directorates and officers.

IN THE SENATE OF THE UNITED STATES

May 16 (legislative day, January 3), 1989

Mr. Metzenbaum (for himself, Mr. Thurmond, Mr. Simon, Mr. DeConcini, Mr. Leahy, and Mr. Hatch) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act regarding interlocking directorates and officers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 8 of the Clayton Act is amended to read as follows:

"Sec. 8. (a)(1) No person at the same time shall be a director or officer of any two corporations, each of which has capital, surplus and undivided profits aggregating more than $10,000,000, as adjusted pursuant to this subsection, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to subtitle IV of title 49, United States Code, if such corporations are by virtue of their business and location of operation, competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

"(2) Notwithstanding the provisions of paragraph (1), simultaneous service as a director or officer of two corporations shall not be prohibited by this section if (A) the aggregate competitive sales of either corporation are less than $1,000,000, as adjusted pursuant to this subsection, (B) the aggregate competitive sales of either corporation are less than 1 percent of that corporation's total sales, or (C) the aggregate competitive sales of each corporation are less than 4 percent of that corporation's total sales. For purposes of this paragraph, 'aggregate competitive sales' means the aggregate gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services over the last completed fiscal year. For purposes of this section, 'total sales' means the aggregate gross revenues for all products and services sold by one corporation over the last completed fiscal year.

"(3) The eligibility of a director or officer under the provisions of paragraph (1) shall be determined by the capital, surplus and undivided profits of each corporation at the end of that corporation's last completed fiscal year.

"(4) For purposes of this section, the term 'officer' means an officer elected or chosen by the Board of Directors.

"(5) For each fiscal year commencing after September 30, 1988, the $10,000,000 and $1,000,000 thresholds in this section shall be increased (or decreased) as of October 1 each year by an amount equal to the percentage increase (or decrease) in the Gross National Product, as published by the Department of Commerce or its successor, for the year then ended, over or under the level so established for the year ending September 30, 1987. At the beginning of October of each year, the Federal Trade Commission shall publish the adjusted amounts required by this paragraph.

"(b) When any person elected or chosen as a director or officer of any corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such corporation in such capacity, his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the capital, surplus and undivided profits, or affairs of such corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date on which an event causing ineligibility occurred, or, if practical, the next regularly scheduled election of directors, whichever occurs first.".

II

101ST CONGRESS
1ST SESSION

S. 995

To amend the Clayton and Sherman Acts regarding antitrust procedures.

IN THE SENATE OF THE UNITED STATES

MAY 16 (legislative day, JANUARY 3); 1989

Mr. METZENBAUM (for himself and Mr. THURMOND), introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Clayton and Sherman Acts regarding antitrust procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Antitrust Procedures Improvement Act of 1989".

CRIMINAL FINES

SEC. 2. Section 1 of the Sherman Act (15 U.S.C. 1) is amended by—

(1) striking out "one million" and inserting in lieu thereof "ten million"; and

(2) striking out "one hundred" and inserting in lieu thereof "two hundred and fifty".

HART-SCOTT-RODINO ACT AMENDMENTS

SEC. 3. (a)(1) Section 7A of the Clayton Act is amended by adding at the end thereof the following new subsection:

"(k) For purposes of this section, annual net sales and total assets of an acquiring person shall, in the case of a partnership, be based upon the annual net sales or total assets of: (1) any general partner, (2) any partner having the right to 50 per centum or more of the profits of the partnership, or (3) any partner having the right in the event of dissolution to 50 per centum or more of the assets of the partnership, provided that the partner or partners required to filed notification under this subsection shall be determined by the Federal Trade Commission in accordance with subsection (d).".

(2) This subsection and the amendments made by this subsection shall become effective one hundred and twenty days after the date of enactment of this section.

(b)(1) Section 7A(a) of the Clayton Act is amended—

(A) in paragraph (2), by striking out "$10,000,000" each place it appears in subparagraphs (A), (B), and (C) and inserting in lieu thereof "$15,000,000"; and

(B) in paragraph (3)(B), by striking out "$15,000,000" and inserting in lieu thereof "$30,000,000".

(2) Section 7A(b)(1)(B) of the Clayton Act is amended—

(A) by substituting "twentieth" for "fifteenth"; and

(B) by striking out "or (g)(2)" and inserting in lieu thereof the following ", (g)(2), or (g)(3)".

(3) Section 7A(e) of the Clayton Act is amended—

(A) by substituting "20-day" for "15-day" each place it appears;

(B) in paragraph (2) by striking out "(or in the case of a cash tender offer, 10 days)"; and

(C) by striking out "only" from the last sentence of paragraph (2) and inserting at the end thereof the following: "or (g)(3)".

(4) Section 7A(g) of the Clayton Act is amended—

(A) in paragraph (1), by striking out "$10,000" and inserting "$100,000" in lieu thereof; by striking the period at the end of the first sentence and inserting: ", in addition to such equitable relief as the court finds appropriate."; and by inserting the following at the end thereof: "or the Federal Trade Commission."; and

(B) by adding the following at the end thereof:

"(3) The court may extend the additional period for up to 25 days if, due to the complexity or scope of the information or documentary material to be evaluated, the Federal

Trade Commission or the Assistant Attorney General reasonably requires such additional time to determine whether the proposed acquisition may, if consummated, violate the antitrust laws."

(5) This subsection and the amendments made by this subsection shall become effective one hundred and twenty days after the date of enactment of this section.

FILING FEE

SEC. 4. The Clayton Act is amended by inserting between section 7A and section 8, the following:

"FILING FEE

"SEC. 7B. (a)(1) Notwithstanding the provisions of section 7A, no notification shall be considered filed until the acquiring person filing such notice pays the filing fee required by this section.

"(2) The fee required by paragraph (1) shall be equal to one-fiftieth of one percent of the value of the transaction involved in such merger, provided that the Federal Trade Commission may establish rules pursuant to subsection (d) for transactions in which the precise value is not known, but in no event shall the fee exceed $50,000.

"(b) All fees collected pursuant to the provisions of this section shall be evenly divided between the Department of Justice and the Federal Trade Commission and shall be allocated to such agencies for the enforcement of the antitrust laws.".

II

101st CONGRESS
1st Session

S. 996

To amend the Clayton Act regarding damages for the United States.

IN THE SENATE OF THE UNITED STATES

May 16 (legislative day, January 3), 1989

Mr. Metzenbaum introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act regarding damages for the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government Remedies Improvement Act of 1989".

TREBLE DAMAGES FOR THE UNITED STATES

Sec. 2. Section 4A of the Clayton Act (15 U.S.C. 15a), is amended by striking out "actual" and inserting in lieu thereof "threefold the".

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